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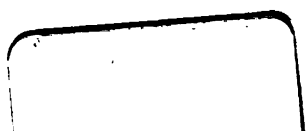
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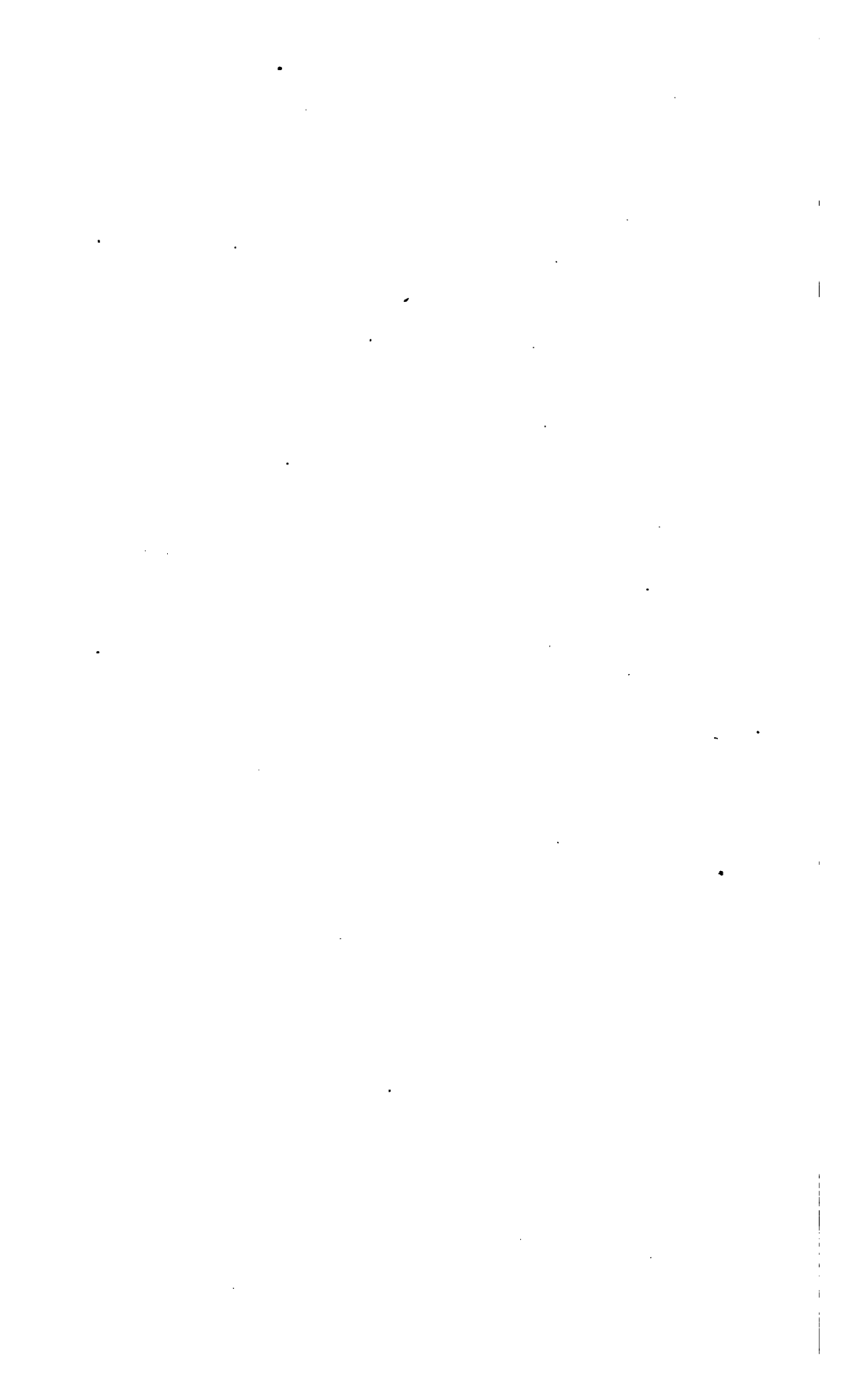
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES, *, Circuit Court,*
(6th circuit)
FOR THE
SIXTH JUDICIAL CIRCUIT.
BY
WILLIAM SEARCY FLIPPIN, ESQ.,
COUNSELLOR AT LAW,
AND REPORTER TO THE CIRCUIT.

VOL. II.—1877-1881.

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TO

GEORGE GANTT,
OF MEMPHIS,

THE ELOQUENT ADVOCATE,
(A MAN OF FEW FAULTS AND MANY VIRTUES,)

IN RECOGNITION OF THE FRIENDSHIP—NEVER FOR A MOMENT INTER-
RUPTED—WHICH HAS SUBSISTED BETWEEN HIM AND THE
REPORTER FOR A PERIOD RUNNING BACK OVER
MORE THAN THIRTY-THREE YEARS,
THIS VOLUME IS DEDICATED.

92027

PREFACE.

One of the District Judges having suggested that he experienced considerable difficulty in finding Federal decisions on points of criminal law, it was deemed advisable to insert a few cases of that character in this volume.

An effort was made to bring the decisions down to July 1, 1882, but the publishers found that this would make the book too large, and wholly out of proportion to the first volume.

W. S. F.

ROSEDALE, by SPRINGDALE,
Near MEMPHIS, Sept. 21, 1882.

**NAMES OF JUDGES WHOSE OPINIONS ARE
REPORTED HEREIN.**

HON. NOAH H. SWAYNE, (late) Associate Justice Supreme Court.

HON. HALMER H. EMMONS, (late) Circuit Judge.

HON. JOHN BAXTER, Circuit Judge.

HON. HENRY B. BROWN, District Judge, Eastern Michigan.

HON. MARTIN WELKER, District Judge, Northern Ohio.

HON. SOLOMON L. WITHEY, District Judge, Western Michigan.

HON. PHILIP B. SWING, District Judge, Southern Ohio.

HON. ELI SHELBY HAMMOND, District Judge, Western Tennessee.

HON. CONNALLY F. TRIGG, (late) District Judge, Middle Tennessee.

HON. BLAND BALLARD, (late) District Judge, District of Kentucky.

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

SIXTH JUDICIAL CIRCUIT.

UNITED STATES v. ALEXANDER L. SNOW.

CIRCUIT COURT—EASTERN DISTRICT OF TENNESSEE—MARCH
26, 1877.

CHARGES FOR COLLECTING PENSION.—To an indictment for retaining a greater sum than the statutory allowance for collecting a widow's pension, it is a good plea that the husband of the applicant, for whose services the pension was sought, was charged on the rolls of the War Department as a deserter, and that it was agreed between defendant and the applicant that he should receive one-half of the first payment on account of the pension, less costs and expenses, for his services in causing such charge to be removed.

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To an indictment for a violation of Revised Statutes, § 5485, in retaining a greater compensation than allowed by law for prosecuting a claim for a widow's pension, defendant pleaded that the husband of the applicant for whose service the pension was sought, was charged on the rolls of the War Department as a deserter; that no pension could be allowed till such charge was removed; that it was accordingly agreed between him and the widow that he should receive one-half of the first payment on account of the pension; (such payment being about \$1,200,) less his costs and expenses, for services in causing such charge to be removed, and the further sum of \$10 for prosecuting her claim for the pension, all of which was done, etc.

To this plea the District Attorney demurred.

George Andrews, District Attorney, for the United States.

W. O. Henderson, for defendant.

BROWN, J.—By Revised Statutes, § 5485, it is provided that “any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand or receive, or retain a greater compensation for his services” than is elsewhere provided, “shall be deemed guilty of a high misdemeanor.”

This compensation is “such as the commissioner of pensions shall direct to be paid to him, not exceeding \$25; § 4785. And in case no agreement is made with the applicant, and filed with, and approved by, the commissioner, the fee shall be \$10, and no more; § 4786.

The section first above quoted being not only penal in its character, but in derogation of the common law right of every person to make his own bargain, should receive a strict

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construction. The design of the act was to prevent exorbitant charges being extorted by pension solicitors from a class of persons who are usually illy able to pay them, or to assert their rights against parties who hold the money in their hands. It was intended to fix a fair compensation for the labor usually and ordinarily necessary in obtaining a pension, but not for extraordinary services performed in a different department for a different purpose, although the ultimate object of those services may be the obtaining of a pension. The labor involved in procuring a widow's pension is ordinarily very slight, consisting merely in filling out a blank petition and affidavits showing the enlistment and death of the soldier, his marriage to the petitioner, and the number and ages of her minor children. The records of the War Department are then referred to to confirm the fact of enlistment and death. For these services \$10 was regarded as a fair compensation, although the parties may contract for the payment of \$25, provided a prior agreement be made to that effect, and filed with, and approved by the commissioner. Clearly the statute covers only services, and the attorney would still be entitled to charge for expenses incurred in procuring testimony.

But in the case under consideration, defendant was called upon to perform a service entirely distinct from that usually required in such cases. The soldier was registered as a deserter on the rolls of the War Department, and until that charge was disproved his widow could not recover her pension; §§ 2438, 4749.

Although in the particular case the service was performed in aid of the pension, it was essentially a distinct service and might have been required for another and different purpose. A deserter loses his right of citizenship, § 1996; he cannot enlist in the army or navy of the United States, §§ 1118, 1420; and an officer mustering him in would be subject to punishment, § 1342, article 3. The records of the War

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Department will only be corrected by plenary proof of mistake, and when a claim for a pension has once been advanced it must be prosecuted to completion in five years, § 4717. It will be readily perceived that it may become an object of the utmost importance, to have a charge of desertion stricken out for other purposes than obtaining a pension. The difficulty of securing the requisite evidence is frequently very great, and in this case, it was admitted that an expense of over \$300 had been incurred by the defendant for that purpose. To limit his compensation in such a case to \$10 would be an adherence to the letter of the statute which Congress could not have contemplated.

It is believed no authority can be found exactly in point; but a class of cases arising under the usury laws announce the principle here involved, viz.: that when a lender has made unusual effort or incurred extraordinary expense in connection with the loan, an agreement to repay his charges for services and disbursements, if made in good faith and not merely as an evasion, will not be deemed usurious. In the early case of *Auriol v. Thomas*, 2 Term Reports, 52, it was held that where a bill endorsed over is not duly paid, the indorsee may charge the indorser with exchange, and other incidental expenses beyond the amount of legal interest, if such charges be reasonably warranted by custom and not made a color for usury. This authority was followed in *Palmer v. Baker*, 1 Maule & Selwyn, 56; and in *Baynes v. Fry*, 15 Vesey, 120. In *Harger v. McCulloch*, 2 Dennison, 119, it was held that where a creditor at the request of the debtor, and upon his express promise to pay the expenses, took a journey to the residence of the latter with a view to settling the demand, and afterwards included such expenses in a security taken for the debt; the security was not usurious. This case was approved in *Thurston v. Cornell*, 38 New York, 281, in which it was held that where a party

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solicited to make a loan, and to procure the means of doing so, must spend time, and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious. Whether the payment upon a loan of more than the legal rate of interest is usurious, depends upon the particular facts of the case and the intention of the parties, and these are questions for the jury. If paid for the loan or forbearance of money it is usury, but if the excess is for other good and valuable considerations, not interposed as a device to cover usury, the transaction is not usurious. The same principle was stated in *Eaton v. Alger*, 2 Keys, 41, in which the court observe: "even where the lender, without any special agreement with the borrower, in addition to lawful interest, takes a commission, by way of compensation for trouble and expense necessarily incurred in and about the business of the loan, the transaction would be supported, provided such commission was not intended as a device to cover a usurious loan."

See, also, to the same effect, *Eldridge v. Reed*, 2 Sweeny, 155; *Beadle v. Munson*, 30 Connecticut, 175; *Gambril v. Doe*, 8 Blackford, 140; *Smith v. Silvers*, 32 Indiana, 321; *Smith v. The Muncie National Bank*, 29 Indiana, 158; *Tyler on Usury*, 130.

In the case under consideration, if the agreement set up in the plea were made in good faith, for services actually performed as therein stated, and not as a mere pretext for charging more than the statute allowed for obtaining a pension, the defendant is entitled to an acquittal.

I am not called upon to determine whether his charge be reasonable or not; that must be litigated in another forum; the question of good faith only is here involved and that must be submitted to a jury.

An order will be entered overruling the demurrer.

THE ORIENTAL.

DISTRICT COURT—NORTHERN DISTRICT OF OHIO—APRIL
TERM, 1877.

In the admiralty, the court will not, on mere motion, at a subsequent term, set aside a decree made at the hearing.

The facts are fully stated by the court.

Newberry, Pond & Brown, for the motion.

Ingersoll & Williamson, and *Willey, Terrell & Sherman*
contra.

WELKER, J.—At the January term, 1876, of this court (on 22d February) this cause came on for trial on the issue, the respondents and claimants or their proctors not being present. The libellant demanding a trial the same was had and a decree entered for him. Notice of appeal was entered by order of the court on behalf of claimants and respondents. No appeal was taken. Afterward, at the April term, 1876, of this court, to-wit: on the 4th day of May, the claimants and respondents filed a motion to set aside the decree for the reason that the hearing upon which the same was rendered, and its rendition was a surprise upon the respondents and proctors in the cause.

This cause was commenced on the 3d day of October, A. D. 1870. The claim of the respondents and their answer were filed on the 21st day of November, A. D. 1870, and

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had been continued from term to term until the term at which it was tried.

Numerous affidavits are filed in support of the motion, and also affidavits against it.

It appears in substance from the affidavits of the respondents, that their proctors resided at Detroit, and those of the libellants at Cleveland. That Moore & Griffin, who reside at Detroit, as proctors for the libellants, had served notice upon respondents' proctors to take depositions at Detroit in 1873 and in 1874; that depositions were taken under that notice by Moore & Griffin; that ever since this cause was commenced the proctors of the respondents had the constant assurance from Mr. Moore, one of the firm, that notice would be given them of the trial of the cause, and that reliance was placed upon that assurance, and no such notice was ever given.

It also appears that Moore & Griffin were only employed to take the testimony at Detroit, and were not present at the trial or knew of it, trial being conducted by the proctors of record at Cleveland. Affidavits were also presented by libellants, tending to show notice of intent to demand trial at the January term; and others on behalf of respondents denying any notice. No allegations are made of any fraud practiced by libellants or their proctors, except the failure of Moore to give notice to respondents' proctors of intent to demand a hearing; nor does it appear that the proctors of record at Cleveland had any knowledge of the arrangement with Moore as stated.

But the view I take of the motion makes it unnecessary to consider the affidavits on either side.

The motion is made after the term at which the trial was had and decree entered. Can a decree be thus set aside at a subsequent term of the court? Or should a motion for that purpose be considered when not filed at the term?

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There are numerous authorities for setting aside decrees *pro confesso* in chancery obtained by fraud at a subsequent term, but only on petition filed in regular form for that purpose, and on which evidence can be taken in the regular way to establish the fraud. But I find no case in admiralty where a decree on a hearing was set aside on motion at a subsequent term.

By general Admiralty rules 29 and 40, it is provided that the court may, in its discretion, upon the motion of the defendant and payment of costs, rescind a decree in any suit in which on account of his contumacy and default the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered.

In an early case, *The Illinois*, Judge Wilkins, of the Eastern District of Michigan, refused to set aside a decree after the lapse of ten days, in a case where the decree had been entered up in the absence of the respondent or his proctor, who was at the time engaged in trying a case in one of the country circuits; holding that he had no power to do so after the lapse of ten days. This rule was adopted in the case of *Northop v. Gregory*, 2 Abb. U. S. 503, by Judge Longyear, of the same district, holding that a motion to open a decree in admiralty entered by default must be made within ten days after the entry of the decree. These decisions, in a recent case decided by Judge Brown, *Thompson v. Carson*, of the same district, were cited and approved by him—(manuscript.)

The general rule is that after the adjournment of the term, courts have no power to change their judgment or decree on a mere motion. Other machinery has been devised in the law to correct errors at subsequent terms which must be used for that purpose.

This motion, not having been filed until after the adjournment of the January term, cannot, therefore, be granted and must be overruled.

Buell v. Connecticut Mut. Life Ins. Co.

ANNA M. BUELL v. THE CONNECTICUT MUTUAL
LIFE INSURANCE COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF OHIO—APRIL
TERM, 1877.

LIFE INSURANCE—WARRANTIES AND MISREPRESENTATIONS ON AN
APPLICATION FOR LIFE INSURANCE.

1. Statements in an application for insurance or answers to questions are either warranties or representations. If warranties then materiality, or want of materiality as to the risk has nothing to do with the contract. The only question is were they untrue, and, if so, the policy is void. But if representations, then to avoid the policy they must be substantially and materially untrue, or made for the purpose of fraud.

2. The true rule as to what amounts to a warranty or what amounts to a representation, is: whenever the answers are responsive to direct questions asked by the insurance company, they are to be regarded as warranties, and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations.

Heard on demurrer to second defense.

The facts appear fully in the opinion.

R. P. & H. C. Ranney, for demurrer.

Bishop & Adams, contra.

WELKER, J.—This suit is founded upon a policy of insurance upon the life of Jeptha C. Buell, for the benefit of his wife, the plaintiff.

The defendant, as a second defense to the action, sets up in its answer that in the declaration made at the time of the

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application for insurance, among other things, the plaintiff says: "And I do hereby agree that the answers given to the following questions and the accompanying statements, and this declaration shall be the basis and form part of the contract or policy between me and said company; and if the same be not in all respects true and correctly stated, the said policy shall be void."

That among the questions in said declaration above referred to, was the following question: "Has father, mother, brother, or sister of the party died, or been afflicted with consumption, or any disease of the lungs, or insanity? If so, state full particulars of each case." That the answer to the above question given by the plaintiff was as follows: "No. Father died from exposure in water; age 58. Mother living; age about 50." That the policy issued upon said declaration and questions and answers, and sued upon, contains the following conditions, to-wit: "And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers and declaration made by the said Anna M. Buell, and bearing date the 19th day of March, 1866, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, in such case, this policy shall be null and void." The defendant avers that the said answer above stated was not in all respects true and correctly stated, but was incorrect and untrue in this, the father of said Jephtha C. did not die at the age of 58, but he died before he was of the age of 30 years. Wherefore the defendant says said policy was and is void and of no effect, and said plaintiff is not entitled to recover any amount against the defendant.

To this answer the plaintiff files her demurrer, alleging as reason therefor, that all of said statements and allegations are redundant and irrelevant, and constitute no defense to

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the plaintiff's action. The demurrer admits that the answer to the question as stated in respect to the age of the father at the time of his death was untrue and incorrect. That, being the fact, does it constitute a defense to this action?

Statements in the application for insurance in the declaration, or answers to the questions are either *warranties* or *representations*. If warranties then materiality, or want of materiality as to the risk has nothing to do with the contract. The only question is were they untrue, and if so the policy is void. But if representations, then to avoid the policy they must be *substantially* and *materially* untrue, or made for the purpose of fraud.

In 2 O. S. R. 464, the Supreme Court of Ohio say: "The distinction between a warranty and a representation is easily comprehended; the difficulty only arises in its application to particular cases." "An express warranty is a stipulation in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends." "It may be contained in another paper, if distinctly referred to in it and expressly made a part of the contract between the parties." A representation is defined to be, "a verbal or written statement made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact or state of fact tending to induce the underwriter more readily to assume the risk by diminishing the estimate he would otherwise have formed of it."

In the case of *Campbell v. N. E. Ins. Co.*, 98 Mass. 381, in defining what is a warranty and what is merely a representation, the court say: "When statements or engagements on the part of the insured are inserted, or referred to in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy they do not necessarily become warranties. Their character will depend upon the form of the expression used, the ap-

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parent purpose of the insertion, and sometimes upon the connection or relation to the other parts of the instrument."

Upon this subject our Supreme Court, in 2 O. S. R., say: "But it is by no means * * * clear that what is in its nature preliminary and designed for the information of the underwriter, will so change its character as not to be satisfied by a substantial compliance; from the fact that it is, by appropriate words in the policy, made a part of it."

But I am referred to the case *Jeffries, Administrator of Kennedy, deceased, v. Economical Life Ins. Co.*, 22 Wall. 47, recently decided by the Supreme Court of the United States as decisive of the question made upon this demurrer. In that case there were two questions asked the insured: 1. Whether he was married or single? The answer to which was that he was single. 2. Had any application been made to any other company, and if so, when? The answer to which was "No." The answers to both questions were alleged to be untrue. The court held that the answers to these questions constituted a part of the contract, and if untrue, whether they were material to the risk or not, would avoid the policy. The court did not seem to put this upon the ground alone that the answers constituted warranties, but that they formed a part of the contract and were expressly made so by the parties, and the court would not inquire as to the materiality, because the parties had themselves deemed them material. How did they become material? It will be observed that both of these answers were direct responses to the questions, and that by the direct form of the questions the answers necessarily became a part of the contract. How is it in that respect in the case before us?

The falsity complained of in the answer consists only in reference to the age at which the father died. This certainly was not inquired of in the question, unless we are to find it in that part of it which reads: "If so, state full particulars

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of each case." This part of the question was evidently intended to reach simply the particulars of the death, or affliction of the near relatives, to ascertain the character and nature of the disease—its extent, whether produced from recent causes or hereditary in the family, in order to determine whether Buell was a proper subject to insure. It is exceedingly doubtful whether the question is really definite enough to require the answer to state whether the father was dead at all, if he did not die of consumption, or disease of the lungs, or insanity. I think the question fairly means, not whether the father, etc., had died of *any disease*, or *from any cause*, but whether he had died of, or been afflicted with, consumption or any disease of the lungs, or insanity. This being the fair import of the question, "No" was a complete answer to it, and the remainder of the answer was uncalled for and not responsive to the question. But suppose that be so, defendant claims that it is nevertheless an answer of some sort and therefore an important part of the contract. The reply to that is, that the declaration which relates to the answers to questions to be made by plaintiff, and which it was agreed should be made part of the contract, must be construed to, and does mean, such answers as are responsive to the questions and such as may be called for by the defendant; and that it does not cover such answers as may be volunteered and irrelevant, and that amount to mere representations.

In the light of the cases in 98 Mass., and 2 O. S. R., I may be allowed to say that not all the statements in the application or writing are to be regarded as warranties, but some may be regarded as mere representations. I do not think the case of *Jeffries v. Economical Insurance Company* is at all at variance with this construction. In that case the questions directly called for the answers, and the asking and the answers constituted the mutual agreement of the parties.

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In this case the age of the father was not called for, and is only voluntarily given by the plaintiff, and the mutual agreement cannot arise as it did in that case, so as to say the parties themselves settled the question of materiality.

I believe the true rule in relation to the question of what amounts to a *warranty*, or what amount only to *representation*, in the answers to questions in this class of applications, is: Where the answers are responsive to direct questions asked by the insurance company, they are to be regarded as warranties, and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations. The part of the answer in question in this case in reference to the age of the father at death, being a mere representation, does not constitute a defense unless it appears to have been material as well as false.

The demurrer is therefore sustained.

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THOMAS A. SCOTT AND G. W. CASS, TRUSTEES, v.
THE MANSFIELD, COLDWATER AND LAKE
MICHIGAN RAILROAD COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF OHIO—APRIL TERM,
1877.

PRACTICE IN CHANCERY.

A party interested in the *res* in controversy, not made a party in the bill, may on his motion or petition, be made a party by amendment of the bill.

The facts are fully stated in the opinion of the court.

John P. Shipman, H. C. Hedges, and Otis, Adams & Russell, for the motion.

Rufus P. Ranney and J. T. Brooks, contra.

WELKER, J.—The bill is filed by complainants as trustees of bondholders to foreclose a mortgage executed by the defendant upon their railroad, to secure bonds issued by the company, and prays the sale of the railroad to pay the same.

Swan, Rose & Co., who are not parties to the bill, file their motion asking an order that the complainants may be required to amend their bill so as to make them parties defendant, with leave to answer. They state that they were contractors for the building of the railroad of the defendant, that they built a large part of it, for which defendant was indebted to them, and that before the filing of the bill, they

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had recovered a judgment in the State court against the defendant for a large amount, and on which execution was issued and duly levied upon the road, and which is claimed to be a subsisting lien upon the road; the judgment not having been paid. They also allege that the mortgage of the complainants is not a valid lien upon the railroad, and not superior to their lien thereon, and that they have a good and sufficient defense to the mortgage of the complainants.

The motion is resisted by the complainants on the ground that they have made the only party necessary, and that to amend by making these lien holders parties is unnecessary, claiming that the proper parties are before the court to enable it to make a final and complete decree in the premises.

The question is whether Swan, Rose & Co. can be thus made parties on their motion so made?

From a very careful examination of the authorities, I find it stated as a general proposition in equity proceedings, that all parties interested in the subject-matter of the suit should be made parties; that if it appear at any stage of the case, that there are parties in interest, not so made parties, the court may withhold a decree until such parties are brought before the court, or dismiss the bill for want of such parties; but that a bill would not be dismissed if such parties were in court as would enable the court to determine the whole case.

In this case, the railroad company having been made defendant, with the right to make defense to the claim of the complainants, and to set up all legal defenses to the bonds of the complainant, would enable the court to make a final decree in the case between the parties. But Swan, Rose & Co., have an interest in the subject-matter of the suit, by reason of their judgment and levy upon the railroad, and which interest would also be determined by the decree between the present parties, for if the mortgage of the complainant be

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held to be a good and valid lien upon the road and the value of the road not be sufficient to pay both liens, it will necessarily take from them the lien thus acquired by them.

It is conceded that they could file their original bill, making the complainants and the railroad company defendants, and in that way attack the bonds and mortgage of the complainants, and ask the court to enforce the lien upon the road. That being done, the court would then have two cases, involving substantially the same controversy, and which, no doubt, could be consolidated into and tried as one suit. The practice proposed to be adopted will save this circuity of actions, and puts this one in a shape to settle all the questions made in the case. It would be but the enforcement of the general practice in chancery of making all lien holders defendants where a bill is filed by one lien holder to enforce the lien by sale of mortgaged premises.

I find in the case of *Coleman v. Martin*, 6 Blatchford, 120, this practice approved by Judge Blatchford. In that case he lays down this general rule: "In a suit *in rem*, where the court has jurisdiction over the *res*, and its decree affects the interest in the *res* of all persons who have any interest in the *res*, a person who has a lien or claim upon, or other interest in the *res*, is allowed to intervene, and be heard for his own interest in the *res*. The theory of this is, that the person, by his interest in the *res*, has an interest, in a legal sense, in the subject matter of the controversy,"

In 16 Georgia R., 137, it was held: "That a court of equity will extend to one who is not a party to the bill, the privilege of becoming a party at his own instance, when, from the case made, it sees that the ends of justice would be subserved by it."

It seems to me, therefore, that upon principle, as well as upon precedent, Swan, Rose & Co. ought to be made parties; and that it is good practice, and a proper way to require this

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to be done on their motion or petition; and the order is accordingly made requiring the complainants to amend their bill by making them also defendants in this case.

THE ALICE GETTY.

DISTRICT COURT—WESTERN DISTRICT OF MICHIGAN—APRIL 9,
1877.

PRIORITY OF LIENS—MARITIME OR STATE LIENS TO BE PAID BEFORE MORTGAGE LIENS, WHERE BY GENERAL MARITIME OR LOCAL LAW A LIEN IS GIVEN.

A mortgage lien upon a vessel has no priority over maritime claims of any class for which either the State or maritime law gives a lien, but is postponed to those liens.

F. W. Cook, for Miller.

WITHEY, J.—Exceptions to the clerk's report as to the order in which creditors of the "Getty" are entitled to be paid out of the proceeds have been filed, and present questions which, in part at least, were passed upon by this court in *The St. Joseph Case*, 1 Brown's Admiralty, 202. The tug belongs at Muskegon, in this State, and most of the libels are for supplies, repairs, etc., furnished in Michigan. She was accustomed to take tows across the lake, and there is one libel for supplies furnished in Chicago, besides several for seamen's wages.

The original libellant's claim is for necessaries furnished

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the tug in Michigan. For this claim a decree was obtained and the tug sold. A number of intervening libels were filed before sale, and a number of creditors asserted their liens after sale upon the proceeds. Besides these, Rogers petitioned to have the proceeds applied upon two mortgage liens. The filing of his mortgages in the custom house antedated nearly all the other lien claims. The clerk's report gives priority to the strictly maritime liens, viz.: seamen's wages and the claims for supplies furnished out of the State. After satisfying these and the costs there is a surplus. Then preference is given to liens under the State law asserted before sale of the tug. There is still a surplus, and this is given to the mortgage claims to the exclusion of domestic liens after sale against the proceeds. These latter creditors except to the report because they are postponed to the mortgage creditor, and the mortgage creditor excepts to the report because his lien is postponed to those domestic liens which were asserted by intervening libels before sale. Rogers, the mortgagee, insists that he is entitled to rank next to those liens established for seamen's wages and the foreign creditors.

The court held in the St. Joseph case that mortgage liens do not have priority over maritime claims of any class for which either the maritime law or the State law gives a lien. We have repeatedly affirmed that view, and so far as we are advised neither the Circuit Court of this circuit nor the Supreme Court has held a contrary rule to govern as to priorities. In the Northern District of Illinois it was decided that a mortgage lien outranked domestic liens. 2 Bissell, 131; 6 Bissell, 367. In the last named case, 6 Bissell, it seems to have been the opinion of the learned district judge that the Lottawanna, 21 Wall. 555, had settled this question in favor of the priority of a mortgage lien over those liens created by State laws, but this we think is a misapprehension as to what was there decided.

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We do not know what bearing the Illinois statute may have had in determining the priorities in the cases in the District Court of Illinois, if any. The Michigan statute giving the lien on domestic vessels, fixed their priorities over mortgage liens, §§ 6678, 6679. If the State may give the lien, we do not see why it may not fix the rank as between the several domestic and mortgage lien creditors. But we are of opinion that if the statute be silent on the subject, the principles of the maritime law would postpone mortgage liens to all maritime claims where by the general maritime law or by the local law a lien is given. It would not be claimed that a purchaser of a vessel could successfully assert a claim to proceeds against either class of maritime claims. Viewed in the proper light, a mortgagee is a purchaser subject to a condition, the performance of which condition by the mortgageor will defeat the mortgagee's title. Now, nothing is better settled than that a mortgage on a vessel creates no maritime claim; on the contrary, the mortgage represents an ordinary debt to which we attach no maritime rights whatever, and can no more be enforced in admiralty courts than can a judgment or execution lien in favor of a creditor, who has, through proceedings in a State court, levied on the vessel. The mortgage gives a lien and so does the levy, but neither can operate to deprive maritime claims, for which the local or maritime law gives a lien, of superior rank and claim to priority, and this rests upon that measure of public policy in favor of those who supply vessels with necessary things to enable them to proceed on their voyage, without which marine commerce could hardly be sustained, and because the supplies are supposed to be to the advantage of both owners and creditors of the vessel.

The only standing a mortgagee can obtain in a proceeding in admiralty is against the remnant in the registry, and this only by petition under the 43d admiralty rule. We under-

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stand the Lottawana case to have settled nothing on the question whether a mortgage lien outranks a lien for supplies given by the local law. In that case it was held that liens asserted under the law of Louisiana had never been perfected and therefore had no standing before the court; this left the mortgagees at liberty under the 43d admiralty rule to come forward and claim what was left of the remnant in the registry of the court as against the owner of the boat. We regard that case as supporting in very many points what we have said. If a mortgagee wishes to avoid claims arising against the mortgaged vessel, he should take possession and avoid debts, but if he lets her sail, he understands the necessity which may arise for supplies and repairs on the credit of the ship, and he can no more defeat those debts by asserting his mortgage than could a purchaser. He is benefited by any repairs and may be by ordinary supplies, which enable the ship to proceed on her voyage and thus save her freight.

We entertain no doubt upon the subject, and sustain the exceptions by those having liens under the State law, whose libels were filed subsequent to the sale of the vessel, and direct that the decree be entered so as to give them priority over the mortgaged liens.

We overrule the exceptions filed by Rogers, the mortgagee.

See the case of *The Illinois, White and Cheek* in this volume. Opinion by BAXTER, J., on appeal. [Reporter.

Cooke v. Ford and Arnold.

W. H. COOKE v. C. C. FORD AND H. T. ARNOLD.

CIRCUIT COURT—DISTRICT OF KENTUCKY—MAY TERM, 1877.

1. The act of March 3, 1875, does not entirely repeal section 639 of the United States Revised Statutes, which relate to the removal of causes from the State to the Federal Courts. Third subdivision of section 639, which relates to suit between citizens of the States in which they are brought and citizens of other States, is not inconsistent with the provisions of the act of March 3, 1875.

2. Taking the act of March 3, 1875, and provisions of third subdivision of section 639 together, the result is: first, that no citizen of a State in which a suit is commenced can remove it, except by filing a petition either before or at the term at which it might first be tried.

3. That if a suit be brought between a citizen of the State in which it is brought and a citizen of another State, the latter may remove it by petition, if filed at any time before trial or final hearing, on making an affidavit of prejudice or local influence—such as will prevent a fair trial from being had.

4. The law does not favor the repeal of statutes by implication. The two must be such as that they cannot be reconciled.

This cause came up on motion to remand the same to the State Court.

The action was commenced in the Circuit Court of Warren County, Kentucky, January 7, 1874, but was subsequently transferred to the Common Pleas of the same county. Ford, one defendant, made no defense, and judgment was consequently entered up against him by default, which was according to the practice in this State. Arnold, the other defendant, put in an answer, tendering an issue of fact before a jury. The time at which the cause could have been at first tried had passed by, and even a mistrial had taken place before the act of Congress of 1875, when Arnold filed a petition in said court for the removal of the cause to the

United States Court. At the time of filing his petition, he made affidavit to the effect that he had reason to believe and did believe that he would not be able to obtain justice in the State Court by reason of local influence and prejudice.

The defendant filed a copy of the record in this court, when Cooke, the plaintiff, appeared and moved to remand the cause to the State Court.

H. T. Arnold, Muir, and Bijur & Davie, for plaintiff.

Seymour & Edwards, for defendant.

BALLARD, J.—The sole ground of the motion is that the petition for removal was filed in the State Court too late.

The counsel of plaintiff, with a frankness characteristic of those counsel only who perceive with clearness the true question involved in a case, concedes that the defendant's application for a removal is literally covered by the provisions of the third subdivision of section 639 of the Revised Statutes; and he stakes his case on the position that these provisions are repealed by the act of March 3, 1875. Statutes at Large, vol. 18, p. 470.

The question thus presented for a decision is a narrow one, but it is by no means free from difficulty. Neither the researches of counsel nor my own examination have developed any case which decides or even throws much light upon the question. The only authority to which I have been referred bearing on the precise question at issue, is the late pamphlet by Judge DILLON, on the "Removal of Causes from State to Federal Courts." The learned author, after indicating, doubtfully, his own opinion that the part of subdivision three which refers to the time of removal is not repealed by the act of 1875, says: "This has been decided to be so in the

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Eighth Circuit by Mr. Justice MILLER, and generally in the courts of that circuit, and, so far as we are advised, by the Circuit Courts elsewhere."

I should be disposed to follow, without question, a single decision of so eminent a judge as Mr. Justice MILLER, if such decision were supported by a written opinion, and I should certainly not hesitate to follow the settled rule of decision in the several circuits; but the bare statement that Judge MILLER has decided the question on the circuit, that his decision has been followed in his circuit, and, as far as known, in other circuits, though made by so accurate an author as the able judge of the eighth circuit, cannot dispense with the necessity of an independent examination of the question. Counsel have therefore discussed the question before me as an open one, and as such I propose to consider it. In prosecuting this examination I shall not refer to the acts of Congress relating to the removal of causes which were passed prior to the Revised Statutes. As the Revised Statutes repealed all such prior acts, reference to them, would, I think, tend only to embarrass the inquiry. Indeed, the proposition discussed by counsel renders such reference supererogatory. The defendant's counsel rests his right to the removal on the ground that the third subdivision of section 639 of Revised Statutes is still in force; and the plaintiff's counsel rests his motion to remand on the ground that it is repealed.

Plaintiff's counsel does not, of course, insist that it is in terms repealed, but he maintains that its provisions are inconsistent with those of the act of 1875, and hence that it is repealed by the express provision of that act, which declares that "all acts or parts of acts in conflict with the provisions of this act are hereby repealed." I shall, for a like reason, confine my attention to the provisions of the statute which relate to the removal "of controversies between citizens of

different States," and shall omit all reference to the provisions contained in them which prescribe the amount necessary to give the court jurisdiction.

Omitting, then, all except what is necessary to elucidate the question before us, let us bring the provisions of the Revised Statutes and of the act of 1875 together, and we shall then be the better able to see whether the latter are in conflict with the former.

Section 639 of the Revised Statutes provides that "any suit commenced in a State Court * * * may be removed for trial into the Circuit Court. * * *

"First—When the suit is * * * by a citizen of the State wherein it is brought and against a citizen of another State."

"Second—When the suit is by a citizen of the State wherein it is brought against a citizen of the same and a citizen of another State."

"Third—When the suit is by a citizen of the State in which it is brought and a citizen of another State."

The act of 1875 authorizes the removal of any suit of a civil nature * * * now pending, or hereafter brought in a State Court in which there shall be a controversy between citizens of different States.

In the first case the suit may be removed on the petition of the defendant only, filed in the State Court at the time of entering his appearance in said court.

In the second case the suit, as against the citizen of another State, may be removed on his petition filed at any time before trial or final hearing.

In the third case the suit may be removed by the citizen of the State other than that in which the suit is brought, whether he be plaintiff or defendant on his petition filed at any time before trial or final hearing of the suit, if before, or at the time he files his petition he makes and files in the

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State Court an affidavit stating that he has reason to believe, and does believe that from prejudice or local influence he will not be able to obtain a fair trial in the State Court.

In the last case (Act of 1875) the suit may be removed by either party—whether he be plaintiff or defendant—a citizen of the State in which the suit is brought, or a citizen of another—on his petition filed in the State Court, before or at the term at which the suit could be first tried and before trial.

The first subdivision of section 639 is doubtless superseded by the more comprehensive provisions of the act of 1875; and there is much ground for the position that the second subdivision is likewise superseded by a provision in the act of 1875, which has not been here mentioned; but I cannot perceive that subdivision three is superseded by the latter act, or that the provisions of the two are in any respect inconsistent.

The act of 1875 provides that; when the suit presents a controversy between citizens of different States it may be removed by either party on his petition, filed before or at the term at which the suit could be first tried and before the trial. Subdivision three provides that when the suit is between a citizen of the State in which it is brought and a citizen of another State, such citizen of the other State may remove it on petition filed at any time before the trial or final hearing, if before or at the time he files the petition, he makes his affidavit of "prejudice or local influence."

Taking the provisions together, it follows:

First—That no citizen of a State in which a suit is brought can remove it, except on petition filed before or at the term the suit might first be tried.

Second—That when the suit is between citizens of different States, neither of whom is a citizen of the State in which the suit is brought, neither party can remove it except on

petition filed before or at the term the suit might be first tried.

Third—But when the suit is between a citizen of the State in which it is brought and a citizen of another State, the latter may remove it on petition filed at any time before the trial or final hearing, if before or at the time he files his petition he makes an affidavit of “prejudice or local influence.”

The first and second propositions are founded on the act of 1875, and the third on subdivision three, and thus reading the provisions of these statutes, they seem to me entirely consistent; nay, it appears that the failure of the act of 1875 to repeal subdivision three was suggested by a sound policy. In a suit between citizens of different States, when neither party is a citizen of the State in which the suit is brought, there is no ground for investing either party with more than his strict right of removal. There is no ground for supposing that “prejudice or local influence” will affect one party more than the other, and therefore no ground of extending the time of his application beyond an early stage in the cause. So when the suit is between a citizen of the State in which it is brought and a citizen of another State, there is no ground for supposing that “prejudice or local influence” will operate against the former, and therefore there is no ground for extending the term of his application; but when the suit is between a citizen of the State in which it is brought and a citizen of another State, there may be many instances where “prejudice or local influence” may prevent justice being done the latter. This prejudice or local influence may not exist in the first stages of the cause, or, if it existed, it may not then be discovered. It may be subsequently developed.

There seems, then, to be the most substantial reason for allowing such citizen of another State to remove a suit at

any stage before trial or final hearing when it appears that, owing to such "prejudice or local influence," he cannot obtain justice in the State Court.

Here I might rest the argument, but I think it possible to make the demonstration still more complete.

Subdivisions one and three of section 639, and the act of 1875, all authorize the removal of a suit on the petition of the defendant when the suit is by a citizen of the State in which it is brought against the citizen of another State. Of course I know that subdivision three also authorizes the removal of such a suit on the petition of the plaintiff when he is not a citizen of the State in which the suit is brought, and that the act of 1875, not only authorizes the removal of such suits, but of all suits between citizens of different States at the instance of either party. But, as I wish to compare the provisions which relate to the same character of suit; and to a removal demanded by the same party, I omit all reference to the provisions of subdivision three, and the act of 1875, which relate to a removal on the application of the plaintiff; and I also omit all reference to the provisions of the act of 1875, which authorize a removal in any suit between citizens of different States, though neither party is a citizen of the State wherein the suit is brought. I omit them because their presence only obscures the inquiry, by diverting attention from the true question, namely, the consistency or inconsistency between subdivisions one and three, and the act of 1875, as they all relate to a suit of the same character; that is to a suit by a citizen of the State in which it is brought against a citizen of another State, and to a removal demanded by the same party.

I repeat, then, that subdivisions one and three, and the act of 1875, all authorize the defendant to demand a removal in a suit by a citizen of the State in which the suit is brought against a citizen of another State.

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By subdivision one he may have a removal on petition filed at the time he enters his appearance in the State Court.

By the act of 1875, he may have it on petition filed before or at the term the cause could be first tried, and before the trial.

By the third subdivision, he may have it on petition filed before the trial or final hearing of the suit, if, before or at the time of filing of said petition, he make and file an affidavit as to prejudice or local influence.

It is thus readily seen that the provision of the act of 1875 is inconsistent with that of subdivision one. Each covers precisely the same ground, and, of course, both cannot stand. But it is just as readily seen that there is no inconsistency whatever between subdivision three and the act of 1875. The one confines the application to a limited time; the other extends the time for a good and substantial reason. Indeed, it must be seen that there is as perfect consistency between subdivision three and the act of 1875 as between subdivisions one and three.

I have not overlooked the opposing argument founded on the title and scope of the act of 1875. It is entitled "An Act to Determine the Jurisdiction of the Circuit Courts of the United States, and to Regulate the Removal of Causes from State Courts, and for other purposes." To determine the jurisdiction of Circuit Courts seems to imply that this act only is to be referred to in order to determine what the jurisdiction of the Circuit Court is. "To regulate the removal of causes from the State Courts" seems to imply that in this act only are to be found the rules which govern the removal of causes. But the title of an act is entitled to little or no consideration in determining the meaning of provisions found in the body, and can never work the repeal of a prior act by its own force. If the provisions of the last act are consistent with those of the first, such consistent

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provisions remain in force, however clearly the Legislature may have indicated, in the title of the last act, an intention to repeal the former.

Nor is the argument founded on the scope of the act more forcible. Its scope is, indeed, broad. It greatly enlarges the civil jurisdiction of the Circuit Courts, but it does not embrace the whole. It limits the jurisdiction which it confers to suits "where the matter in dispute exceeds \$500;" but there are several provisions of the Revised Statutes which extend the jurisdiction to suits involving less than this amount. See section 629, subdivisions 10, 11, 12, 16 and 17. Nor can it be contended that it embraces all prior acts which confer jurisdiction or authorize removal of suits. See sections 640, 641, 643 Revised Statutes. Of course, as it does not embrace all prior acts which confer jurisdiction or authorize removal of suits, and does not, in terms, repeal them, it cannot, under any rule of interpretation, be held to repeal them by implication.

At one time, during the course of this investigation, I was strongly inclined to think that, although the act of 1875 does not either in terms or by implication, repeal all prior acts which relate to the removal of civil causes from State Courts to the Circuit Courts of the United States, it should be held to furnish the one rule for the removal of all such suits as it authorized to be removed, and thus to repeal all prior acts which prescribe a different rule; that as it authorizes and prescribes a rule for the removal of all suits in which there is a controversy between citizens of different States, it repeals by implication all prior acts which relate to the removal of similar suits, and that, as subdivision three does relate to the removal of a similar suit, that is, a suit between a citizen of the State where it is brought and a citizen of another State, which is certainly included in a suit between citizens of different States, it is repealed. But subsequent

reflection has satisfied me that this argument is more specious than sound, and that its whole force is derived from its omission to notice the provision in subdivision three relating to "prejudice and local influence," which is nowhere found in the act of 1875.

It is true, I suppose, that Congress cannot authorize the removal of a suit in the Circuit Court, of which it cannot confer original jurisdiction on that court, and it is true that Congress cannot confer jurisdiction on the Circuit Court to try an ordinary suit between citizens of the same State on the ground of prejudice against one party or of local influence of the other; but it is also true that within the constitutional limits of the jurisdiction it may vest the right of removal upon such grounds as it deems best. It may authorize none to be removed, except on the ground of prejudice in the State tribunal against the party asking the removal, or the local influence of the opposite party, or it may authorize the removal of suits between citizens of different States where nothing more is shown than different citizenship at one stage of the proceedings, and the same suits to be removed at another stage, when prejudice, local influence or other matter is shown. Now, this is precisely what is accomplished by the joint operation of the act of 1875 and subdivision three. The former requires the application for the removal of all suits, including a suit between a citizen of the State in which it is brought and a citizen of another State, when nothing more than different citizenship appears, to be made before or at the time at which the cause could be first tried. The latter allows the application for removal of such a suit to be made at any time before trial or final hearing, when it also appears that the applicant is not a citizen of the State wherein the suit is brought, and that, owing to prejudice or local influence, he could not obtain justice in the State Court.

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But were the consistency between the act of 1875 and of subdivision three less apparent, I should still be constrained, in view of the leaning of courts against implied repeals, to hold that the latter is still in force.

"To repeal a statute by implication, there must be such positive repugnancy between the provisions of the new law and the old, that they cannot stand together or be consistently reconciled." *Wood v. United States*, 16 Pet. 342; *McCool v. Smith*, 1 Black. 459; *United States v. Tynen*, 11 Wall. 92; *Hartford v. United States*, 8 Cranch, 109; *Brown v. County Commissioners*, 21 Penn. 27; *Brown v. Dean*, 5 Hill, 221; *Daviess, etc. v. Fairbairn, etc.*, 3 How. 639; *Potter's Dwarris on Statutes*, 154; *Sedgwick on Statute and Constitutional Law*, 129.

In *Wood v. United States*, Mr. Justice STORY said: "There must be a positive repugnancy between the provisions of the new laws and those of the old; and, even then, the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.

In *McCool v. Smith*, Mr. Justice SWAYNE, quoting Mr. Sedgwick, said: "A repeal by implication is not favored." "The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the Legislature together."

Mr. Dwarris says: "Every affirmative statute is a repeal of a precedent affirmative statute when its matter necessarily implies a negative, but only so far as it is clearly and indisputably contradictory and contrary to the former act in the very matter (*Foster's Case*,) and the repugnancy such that the two acts cannot be reconciled."

A citation of these authorities was hardly necessary to support the argument in this case. The provisions of the act of 1875, and those of subdivision three, have been shown to be perfectly consistent. The latter, therefore, must be held to remain unrepealed without invoking any technical

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rule of construction, or relying on the disfavor in which the courts hold implied repeals; but I have not thought such citation entirely out of place, since, if doubt remains in the mind of any one after reading the preceding abstract decision, it must be dispelled on considering the authorities.

Let an order be entered overruling the plaintiff's motion.

W. W. WOOLLEN, ADMINISTRATOR, v. PETER P.
BANKER.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—MAY 23,
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PATENT RIGHT NOTE LAW OF OHIO UNCONSTITUTIONAL.

By act of May 4, 1869, (State of Ohio,) it is provided that "any note the consideration for which shall consist in whole or in part of the right to make, use or vend any patent invention or inventions claimed to be patented, shall have the words 'given for a patent right' prominently and legibly written or printed on the face of such note or instrument above the signature thereto, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder." Such a law impairs the value of patent right property, created by the constitution and laws of the United States, and is unconstitutional.

James R. Challen, for plaintiff.

Armpt Brothers and Chas. F. Gunkle, for defendant.

Woollen v. Banker.

SWAYNE, J.—The plaintiff brought his action upon a promissory note of \$500, containing the words “given for a patent right.” The defendant set up failure of consideration, for that the patent right was void for want of novelty, and of no value, relying upon the statute of Ohio, passed May 4, 1869, Sec. 66, O. L. 93, which provides that “any note the consideration for which shall consist in whole or in part of the right to make, use or vend, any patent invention or inventions claimed to be patented shall have the words ‘given for a patent right’ prominently and legibly written or printed on the face of such note above the signature, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder.”

The reply sets up that the plaintiff’s intestate purchased said note for value, without notice, before maturity.

Upon a trial by a jury, the defendant offered evidence to show that when the note fell due, and demand was made, he offered to return the patent right and cancel the obligation. The court refused to admit the evidence, and defendant’s counsel excepted. An exception was also taken to the refusal of the court to admit evidence that the patent was void for want of novelty, and of no value, and also to the charge of the court, because the jury were not instructed that the defendant was entitled to the same defenses against the plaintiff, although an innocent purchaser for value before maturity, as he would have against the original payee.

These exceptions raise the question of the constitutionality of the statute of Ohio above quoted, and how much soever it may be disagreeable to this court to pronounce upon the unconstitutionality of a State statute before the Supreme Court of that State has done so, the merits of this case require such duty of us, and we cannot shrink from it.

A construction has been given to the statute in one of its

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bearings by the Supreme Court of Ohio in the *State v. Peck*, 25 Ohio St. 29, in which the court say: "To construe the phrases 'patent right, patented invention, and inventions claimed to be patented' as used in the act to mean machines manufactured under letters patent by the patentee or his assigns, would give to them not only an unusual, forced and unnatural import, but would seriously interfere with and injure the manufacturing interests and commercial prosperity of the State, which cannot be presumed to have been intended by the General Assembly in the passage of the act."

That the Constitution of the United States has conferred upon the Congress the power "To promote the progress of science and the useful arts, by securing for limited time, to authors and inventors the exclusive right to their respective writings and discoveries" by Sec. 8, Art. I., is no more certain than that such power has been exercised by the enactment of patent laws, and that no State can limit, control, or even exercise the power. Congress has not only regulated the manner in which a patent may be obtained, but it has prescribed the manner in which such right may be sold and conveyed, and has imposed the penalties for the infringement thereof. The national government has, therefore, made a patent right, property. The patentee has paid the Government for the monopoly, and it is bound to protect him and his assignee in the use and enjoyment of it. Any interference whatever by any State, that will impair the right to make, use, or vend any patented article, or the right to assign the patent or any part of it, is forbidden by the highest organic law. The statute in question is such an interference, and is unconstitutional.

We are supported in this opinion by every court that has had occasion to pass directly upon the question.

DAVIS, J., *In re Robinson*, reported in 2 Bissell, 309, pronounced the Indiana law, similar in terms to the Ohio law, clearly unconstitutional.

Woollen v. Banker.

The Supreme Court of Indiana, in *Helm v. First National Bank*, 43 Indiana, 167, held that as the Federal government has continuously, from the adoption of the Constitution down to the present time, legislated on the subject of patents, and as, from the nature and subject of the power, it cannot conveniently be exercised by the State, it must necessarily be exercised by the National government exclusively, and add : "We are of the opinion that the Legislature of Indiana possessed no power to pass the statute under consideration, and it must, therefore, be held unconstitutional and void."

And so in *Hereth v. Merchants' National Bank*, 34 Ind., 380, it was held that a maker of a promissory note in the hands of an innocent purchaser for value before due, could not be heard to plead fraud, or failure of consideration, although "given for a patent right" was in the body of the note, and that these words did not put the purchaser on his guard, or convey any notice whatever; being equivalent to "value received." And so in *Hascall v. Whitmore*, 19 Me. 102; *Smith v. Hiscock*, 14 Me. 449.

There is no error in rejecting the evidence offered, nor in refusing to charge the jury as requested. The decision of the court below is sustained, and judgment may be entered on the verdict. Leave to have the cause certified to the Supreme Court refused.

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CIRCUIT COURT—NORTHERN DISTRICT OF OHIO—MAY 31,
1877.

APPEAL IN ADMIRALTY FROM DISTRICT TO CIRCUIT COURT—WITHIN
WHAT TIME TO BE TAKEN.

1. The provisions of Sec. 635, Revised Statutes of the United States, relative to appeals within one year from the time of entering the judgment, order or decree appealed from, do not apply to appeals from decrees in admiralty.

2. Appeals in admiralty should be taken to the term of the Circuit Court next succeeding the term of the District Court at which the decree was rendered.

The facts are set forth fully in the opinion.

Ingersoll & Williamson and Willey, Terrell & Sherman,
for the motion.

Newberry, Pond & Brown and Mix, Noble & White,
against motion.

SWAYNE, J.—This is a motion to dismiss an appeal in admiralty, upon the ground that the appeal was not taken in time. In other words, that it was not taken to the term of the Circuit Court next succeeding the term of the District Court at which the decree was rendered.

The decree was rendered by the District Court at the January term, to-wit: on the 23d of February, 1876, and that term closed on the first Monday in April, 1876. The then

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next term of the Circuit Court began on the first Tuesday in April, 1876. The appeal was taken January 12, 1877, to the April term, 1877, of the Circuit Court. That is, to the fourth term, and not to the first term, there being three intervening terms. The statutes in this connection, which it is necessary to consider, are, first, the act of 1789, section 21, which is as follows:

“From final decrees in a District Court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next Circuit Court to be held in such district.”

Under that provision it has been held that appeals from the District Court in such cases were properly entered at the term of the Circuit Court begun next after the entry of the decree of the District Court, although the term of the District Court, during which the decree was entered, had not been ended when the term of the Circuit Court was begun. In the *United States v. Certain Hogsheads of Molasses*, 1 Curtis's Reports, 276, it was held further, that if an appeal be not taken to the term of the Circuit Court held next after the term of the District Court at which the decree was entered, the right to appeal is lost, and that ends the case, so far as the question of appeal is concerned. 2 Curtis's Rep. 236.

The next act to be considered—as it regards the question under consideration—is the act of 1803, section 2, the language of which is more comprehensive than in the act of 1789. That act is confined expressly to decrees of admiralty. The language of the act of 1803 is: “From all final judgments or decrees in any of the District Courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars,” (reducing the amount of three hundred dollars, required in the act of

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1789, to the sum of fifty dollars,) "shall be allowed to the Circuit Court next to be holden in the district where such final judgment or judgments, decree or decrees, may be rendered," etc.

Under this provision it was held, also, in *Montgomery v. Henry et al.*, 1 Dallas, 50; 3 Mason, 442, and *United States v. Haynes et al.*, 2 McLean, 155, that the appeal must be taken to the next term of the Circuit Court succeeding the term of the District Court, during which the decree was rendered, and that it cannot be taken subsequently. It will be observed—a matter to which I have adverted already—that the language of the second section of the act of 1803 is much larger than the corresponding language in the act of 1789.

Yet it has been held by the Supreme Court of the United States, that notwithstanding the generality of the terms in this act, it made no alteration in the law of 1789 as it respects appeals to the Circuit Court, except in reducing the sum or matter in controversy to fifty dollars, on which such appeals may be allowed. The words, "All final judgments or decrees," refer to judgments or decrees in causes of admiralty and maritime jurisdiction, and in such causes only has this act authorized an appeal from the District Court to the Circuit Court. *United States v. Nourse*, 6 Peters, 496; *United States v. Haynes et al.*, 2 McLean, 155, and *Montgomery v. Henry et al.*, 1 Dallas, 50.

So stood the law of the United States, and such were the adjudications from the passage of the first Judiciary Act of 1789 on the subject, till the passage of the act of June 1, 1872. The second section of that act, or so much of it as is necessary to be considered in this connection, and which, it is claimed, abrogates or repeals the provision, which has been read, of the act of 1803, which was a re-enactment—as before stated—of the provision on that subject of the act of

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1789, and substitutes, as it is claimed, one year for the time prescribed by those acts for the taking of appeals in admiralty from the District Court to the Circuit Court, after regulating appeals from the Circuit Court to the Supreme Court of the United States, proceeds as follows:

"No judgment, decree, or order of a District Court, rendered after this act shall take effect, shall be reviewed by a Circuit Court of the United States, upon like process or appeal, unless the process is sued out, or the appeal taken within one year after the entry of the judgment, decree, or order, sought to be reviewed. *Provided*, that where a party entitled to prosecute a writ of error, or to take an appeal, is an infant, or *non compos mentis*, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken within the period above designated, after the entry of the judgment, decree, or order, exclusive of the time of such disability."

Now, to see the proposition which is presented in its true light, it is necessary to recur to the provision already adverted to in the act of 1789, and in the act of 1803, upon this subject, and then to consider the change which it is claimed this act of 1872 makes in the pre-existing law as to the time within which appeals in admiralty from the District Court to the Circuit Court are proper to be made.

As before remarked, the act of 1789 required such appeals to be taken to the next term of the Circuit Court. That provision remained untouched from 1789 to 1803, and then, although the language employed is broader, yet according to the interpretation given to it by the Supreme Court in 6 Peters, 496, the act of 1803 simply re-enacted, without any change, the provision on that subject of the Judiciary Act of 1789.

That provision remained in force from 1789 to 1872. This is unquestionably so. It has not been controverted in the argument which has been submitted to this court.

It is claimed that by this act of 1872, in the first place, the time to appeal in the class of cases to which the one under consideration belongs, was extended to the period of one year.

No matter how small, or what the circumstances of the case may be, a party, instead of being required by way of hastening the progress of the case to its final determination, as was required by the previous laws, might rest perfectly quiet for the period of one year.

In the next place, it is equally clear, in the event of that interpretation being adopted, that in the event the party entitled to an appeal were "an infant, or *non compos mentis*, or imprisoned, such appeal might be taken within the periods designated after the entry of the judgment, exclusive of the term of such disability." That is to say, if there were a devolution of the right of appeal upon an infant in the progress of the litigation, or if an infant were a party *ab origine* and entitled to an appeal, or a person *non compos mentis* were entitled to an appeal in any way, or a person imprisoned; the infant, it is obvious, under that construction of the statute, would be entitled to twenty-one years, besides the year allowed to a person under no disability, less the day of his birth, and if a person entitled to an appeal should be insane and continue so for fifty or sixty years, upon being restored to sanity, no matter when, he might take an appeal, and so, too, the imprisoned. This would be the necessary consequence of that construction of the intendment.

Now, as adverse to the proposition contended for, independent of these considerations, it is to be remarked, that this provision of the act of 1872, does not repeal the provision in question of the act of 1808. There is no language in the act—nothing explicit—to that effect. If there is any such repeal, it is a repeal by implication, and the rule of law is, that where a repeal by implication is claimed, the conflict

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and repugnancy between the earlier and later statutes—the later working such alleged repeal—must be so clear and palpable and so irreconcilable, as to leave no room for a reasonable doubt, that it was the intendment of the legislative mind in enacting the latter law to repeal the former. I am of the opinion that this is not such a conflict and that this case is not within that character. But this act of 1872 was itself repealed by the Revised Statutes of the United States. It contained substantially both the provision in question of the re-enacting act of 1803, and also of the act of 1872, which is relied upon to have wrought the effect here insisted.

In turning to the provisions of the Revised Statutes in this connection, they will be found as follows: Section 631. "From all final decrees of a District Court in causes of equity or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, an appeal shall be allowed to the Circuit Court next to be held in such district, and such Circuit Court is required to receive, hear and determine such appeal."

Here for the first time equity cases, to be appealed from the District Court to the Circuit Court, are placed upon the same footing with decrees in admiralty, and that is the only departure in this act from the act of 1803, otherwise the language is substantially the same. And it is a well settled rule of interpretation, (see 2 Hill Rep. 702; 24 Wend, 47,) that where a prior act is abrogated by a later one, and the prior one is re-enacted by the later one, unless there be a very material change in the language, such as to exclude the reasonable construction that the subsequent act was intended merely to be put in substitution for or take the place of the prior act, it is to be held still to be substantially the same law. That rule applies here. For all the purposes of this

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case, this second section of the act of 1872 must be simply a re-enactment of the provision upon the same subject of the act of 1803.

Further, in this connection, the meaning of the terms, "an appeal shall be allowed to the Circuit Court next to be held in such district," has been settled by repeated adjudications. As that language was found in the act of 1789 and also in the act of 1803, they must necessarily be held on authority as well as reason to have the same meaning.

Then here is this provision in the Revised Statutes, clear and explicit, viewed from any standpoint, and in any light, leaving no room for doubt, that Congress by this act required as it had required by the act of 1789, and again by the act of 1803, that appeals in this class of causes—that is, appeals in admiralty from the District Court to the Circuit Court—must be taken to the next term of the Circuit Court, after the rendition of the decree in the District Court, or an appeal cannot be taken at all.

It is held that having enacted that long continued provision in accordance with the long continued policy of the legislation of Congress upon the subject, the Legislature that enacted these Revised Statutes in a body, by a subsequent provision abrogated and annulled that provision *in toto*. That is the contention upon the other side; and that is founded upon the re-enactment into these Revised Statutes by Congress of the provision, which has been remarked upon already, of the act of 1872, and which is found in section 635.

"No judgment, decree, or order of a District Court shall be reviewed by a Circuit Court, on writ of error or appeal, unless the writ of error is sued out, or the appeal is taken within one year after the entry of such judgment, decree or order."

The same line of argument applies here that applied to

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this provision of the act of 1872, before its re-enactment into these Revised Statutes, and what has been said upon this subject already need not be repeated.

But there are some further remarks proper to be made beside the points and considerations that there is no express repeal, no express purpose by this provision to change that provision. It has prevailed from 1789 down to the enactment of the act of 1872, if that act made the change contended for. Here are these two sections found in their proximity, one to the other.

It seems to me in the light of all these considerations, without going over the ground that has been gone over already, viewing the subject in the light of the adjudications and rules upon the point of repeals by implication, that it is entirely incredible that Congress should have meant by section 635 to repeal section 631, so far as the time for appeal is concerned, and that section contains nothing else. I say it is incredible that Congress ever enacted one provision by section 631, and on the same page could have intended to enact a repealing provision—repealing by implication, section 631. The considerations which have been adverted to, and which I will not consume time by repeating, it seems to me, fully sustain this rule and exclude any other conclusion upon the points here under consideration.

But it is said that the language is, “no judgment, decree, or order of a District Court” and that this term, “decree,” necessarily includes decrees in admiralty, and the inference follows, if this be so, that there is a repeal by implication to the extent contended.

Firstly, I have to remark, that it is a canon of statutory construction, asserted many times in the best considered adjudications that the intent of the Legislature—if it can be ascertained—constitutes the law; and in connection with that proposition, that a thing may be within the letter of the law

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clearly and not within its meaning, and that a thing may be without the letter of the law and yet within its meaning, and in either case the intent thus established constitutes the law; and judicial determinations to this effect are very numerous. A very well considered case upon this subject is to be found in *Slater v. Cave*, 3 O. S. Rep. 80.

Now under that view of the subject, if it were necessary I should hold that the word "decree" here, has no meaning, and that it would be the duty of the court to exclude it from consideration and to consider it inadvertently inserted as having no effect in fixing the construction of the language found in this statute. And again, see the case of the *United States v. Nourse*, 6 Peters, which has been adverted to. The act of 1803 went in comprehensiveness beyond the act of 1789 in this: that the act of 1789 was confined in terms to decrease in admiralty. The act of 1803 uses the language, "all judgments or decrees," and yet the Supreme Court of the United States in the case mentioned had no hesitation in saying that the act of 1803—notwithstanding this difference—was intended to be confined by the law-making power to decrees in admiralty alone. That no judgment, technically as such, and no decrees, technically as such, was intended to be embraced in that language, except simply decrees in admiralty.

On the authority of that case, as well as other numerous adjudications, if it were necessary, I should have no hesitation in holding in the light of the entire context of these several provisions, that it was the intent of the Legislature not to extend the time within which appeals in admiralty should be taken, but that having fixed the rule upon that subject, then out of abundant caution it was the intent of the Legislature to provide that all other judgments or orders of the District Court, or decrees, if there could be any such besides decrees in admiralty and in equity should be prose-

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cuted within one year from the time of the entry of the decree, and should not be prosecuted after that time.

It has been said with very great force of argument, and I confess that for the moment I was very much impressed by the suggestion, that it is a canon of interpretation, that if it be possible to do so, every word and phrase in the statute shall be taken. Such is to be presumed to be the intention of the Legislature.

This may be the rule on the subject of repeals by implication. If the Legislature had intended to make so improvident and material a change under the circumstances, it can very well be taken that in the act of 1872 a repeal of the provision in question, of the act of 1803, would have been expressly made, and that section 631, which was a re-enactment of the act of 1803, would not be found in these Revised Statutes. But it is by no means to be admitted that this latter canon of interpretation may not be applied here consistently with the maintenance of integrity to both of these provisions—631 and 635. There follows section 631, before reaching 635, this provision, “Final judgments of a District Court in civil actions where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed or affirmed in a Circuit Court, holden in the same district, upon a writ of error.”

Now, as regards such final judgments, there is no limitation as to the time in which they may be reviewed, so far as I am advised, except by this one year limitation in section 635. That section declares, “No judgment, decree, or order of a District Court.” There is material, so far as judgments are concerned, upon which this limitation can operate. Then, as it regards orders, that term is not necessarily to be considered here, but it is obvious it will occur to any one on a moment's reflection, that there may be a very great variety in the earliest proceedings which may be taken up for review.

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I need not remark further upon that subject. An order is not always applicable to a decree in admiralty. That, therefore, does not touch the point here under consideration.

There is no difficulty, then, in giving this section 635 full operation as to judgments or orders without interfering in any way with provision 631.

Now, as to decrees.

It has been said that there is no decree which can be rendered by a District Court, except a decree in admiralty and a decree in certain causes in equity, and that, therefore, according to the contention which has been insisted upon, this limitation of one year applies necessarily to decrees in admiralty and decrees in equity. That, we think, is a mistaken view of the fact. I have not had the time to examine this point as thoroughly as I should have desired, if time had been allowed me.

There were, during the war, provisions in force, under which the property of rebels was forfeited, and many decrees to that effect were entered, but the act is no longer in force. There is the case of the *United States v. Miller*, which I have not had time to examine, but which I recollect perfectly well. In that case a decree of forfeiture was entered. So in the case of the *United States v. Conrad*, a large amount of his real estate was confiscated under the statutory provisions of the United States, touching the property of acting rebels against the government, and a decree of forfeiture was entered at New Orleans by the District Court. It was brought to the Supreme Court of the United States, as was the case of the *United States v. Miller*, and the decrees in both cases were reversed, but they were decrees in forfeiture, and not a decree in admiralty, or a decree in equity.

Now it is sufficient in this connection to remark generally, and without going in detail, that the subsisting revenue laws, both as they regard custom duties and as they regard internal

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revenue duties, so to speak, provide proceedings for forfeitures, and would not be, in the judgment of this court, a misnomer; on the contrary, as I understand the law, it would be in accordance with the settled principles of law to term the final adjudication of the court a "decree," upon the subject of forfeiture, against the respondent or against the libellant, dismissing the libel or information, as the case may be.

Now, in further illustration of that particular view of the subject, I advert to rule 22 of the Supreme Court of the United States, established for the government of the inferior courts of the United States in their action in this class of cases. That rule is as follows:

"All informations and libels of information, upon seizure for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is. The information, or libel of information, shall also propound, in distinct articles, the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause, at the return day of the process, why the forfeiture shall not be *decreeed*."

It is not necessary to advert to any particular legal statutory provision denouncing forfeitures in the various cases to which these provisions have been extended; it is sufficient to remark generally that they are very numerous.

I have already remarked, and repeat, that it would be no misnomer; on the contrary, it is sanctioned by the language of the rule, and it is in accordance with the settled principles

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of law on the subject, to hold that the final judgment of the District Court in most, if not in all, cases of forfeiture would be properly characterized by terming it a *decree*, the jurisdiction being limited to the District Court. Now apply that reasoning to the language of this section, 635, premise—

First—Section 631 has explicitly required an appeal to be taken to the *next* term of the Circuit Court after it was rendered, as was required in the act of 1789, and of 1803 and 1872, and as required in section 631 of this act.

Further, “no judgment, decree or order.” The decrees to which this language refers, or what is meant by the use of that epithet, may well be held to be decrees other than decrees in admiralty and in equity—decrees in the class of causes provided for and contemplated by the rule which has just been read. Now that harmonizes the two sections. It avoids the absurdity, or the improbability, perhaps, would express the idea more accurately, that this provision which unquestionably appears from 1789 to 1872, was intended to be abrogated, and the long period that might intervene in consequence of the disabilities prescribed in that section, should be imported into our admiralty system of the jurisprudence of the United States. It cannot be done in the manner in which it is insisted upon it has been done. It would be held to have been done inconsistently with any sound or reasonable construction, either upon the ground of authority, reason or principle, all of which I know are adverse, and in my judgment conclusive against the proposition contended for. The motion to dismiss must therefore prevail, and the appeal is dismissed.

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THE KATE WILLIAMS.

DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—JUNE
TERM, 1877.

ON MOTION FOR AN ATTACHMENT FOR CONTEMPT.

1. A purchaser at a judicial sale may be compelled in a court of admiralty to complete his purchase by payment of the money.

2. Should the marshal fail to make return of the writ with his action thereon, it is a mere irregularity, which is healed by confirmation of the sale.

3. Though the name of the purchaser be not inserted in the order, a service of such order upon him, when in default, to pay money into court, is sufficient.

4. If a proctor bid at a sale he may be personally held upon it, unless it be known to the marshal for whom he is bidding.

5. The words "her boats, tackle, apparel and furniture," used in the writ and published notices of sale, imply no warranty of a complete outfit, nor even that all the property, that once belonged to the vessel, is in possession of the marshal; especially when he sells her "as she lies."

At the time the tug was seized upon the attachment, most of her apparel and furniture was in the hands of one Demass, and was never taken possession of by the marshal. A decree having passed upon the original libel, a writ of *venditioni exponas* was issued, commanding that the tug, "*her boats, tackle, apparel and furniture,*" be sold on the 26th day of December, 1876. The marshal offered the tug for sale at auction, and struck her off to Julian G. Dickinson for four thousand dollars. The deputy marshal, as he offered her for sale, announced publicly that he sold her "as she was," naming the property that had been seized by him as such officer, and would undertake to deliver nothing but what was upon

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the vessel. His announcement was understood by Mr. Dickinson and by many others who were present at the sale. On the 17th day of January an order was made, reciting the regularity of the proceedings, and confirming the sale. Application was repeatedly made to Mr. Dickinson to pay the money, a bill of sale was executed and tendered him, with a demand for the purchase price, which he neglected to pay, but asked further time, and promised to pay whenever an order of distribution should be entered. Subsequently, he claimed that his client, Mr. Murphy, for whom he had bid off the property, refused to accept the bill of sale, unless all of the apparel and furniture originally belonging to the boat, was turned over to him. There was about \$300 in value of this missing. On the 13th day of February, a further order was made that the proceeds of the sale be forthwith paid into the registry of the court. A copy of this order having been served upon Mr. Dickinson, motion was made for an attachment for contempt in refusing to comply with it.

F. W. Clark and Wm. A. Moore, for the motion.

R. A. Parker, contra.

BROWN, J.—The power of the court, the practice of which is analogous to that of a court of chancery, to compel a purchaser to perform his undertaking and pay the amount of his bid, was admitted upon the argument, and seems to be well settled by the authorities. Rohrer on Judicial Sales, sections 152 to 156; *Wood v. Mann*, 3 Sum. 318; *Brasher v. Van Cortlandt*, 2 Johns. Chan. 505; *Requa v. Rea*, 2 Paige, 339; *Cazet v. Hubbell*, 36 N. Y. 677. The purchaser in cases of this kind is regarded as making himself so far a party to the original proceeding as to render himself amenable to the process of the court to compel obedience to its orders.

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It was claimed in this case, however, that the sale was irregular, for the reason that the marshal had made no return of his writ into court, and no report of sale had been filed. Without undertaking to say whether the mere omission to file the writ and the report of sale would constitute such an irregularity as would vitiate this proceeding, it is sufficient to say that such irregularity, if it existed, was healed by the order of confirmation. 2 Dan. Ch. Prac. 1279; *Todd v. Dowd*, 1 Met. (Ky.) 281.

It is further claimed, that, as the order was general, and not directed to any particular person, it must be presumed to have been made under rule 41, and intended to operate only upon the marshal; but I apprehend such an order would operate upon any person upon whom it was served, and who was actually in default for failing to pay over the purchase price.

Further objection is made, that this court has no power to attach the bidder, inasmuch as he was acting as the agent of another party in making the purchase. Although he was a proctor of this court, it does not appear to have been known to the marshal at the time of the sale, at least by any information received by him, that he was not acting in his own behalf. After the sale was completed, he was asked to whom the bill of sale should be executed, and replied that he would let the marshal know in a short time.

There are three cases where an agent may be held personally responsible upon his contracts:

1. Where it is not known to the other party that he is acting as agent at all.
2. Where the fact of his agency is known, but the name of his principal is not disclosed.
3. Where he exceeds his authority as agent.

Story on Agency, sections 264-268. While, in this case, the deputy marshal may have suspected, or even have been

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satisfied in his own mind, that the buyer was acting only as agent, this knowledge could only have been derived from the fact that he was known as an attorney at law. There was nothing else to put him upon inquiry. Whether this was sufficient to apprise him of his character is immaterial, for it is not disputed that he did not learn the name of his principal until some considerable time after the sale. In his affidavit, Mr. Murphy swears that he authorized Mr. Dickinson to bid for him, upon the belief and understanding that the tug, with all her boats, tackle, apparel, furniture, and appurtenances were included in the sale. If this be so, Mr. Dickinson should not have made the bid, as he was fully apprised at the time that he was buying only such property as was upon her. The marshal is certainly not chargeable with this fault. I deem this of little consequence, however, as Mr. Murphy was present at the sale, heard the announcement of the marshal that he sold her as she was, and interposing no objection to the bidding of his attorney, thereby ratified his action. It is further claimed that the purchasers were misled by the published notices of sale which designated the tug her "boats, tackle, apparel, and furniture," as the property to be sold. These words, however, imply no warranty of a complete outfit, nor even that all the property that once belonged to her is still on board or in possession of the marshal. Where the announcement is made that the tug is sold "as she is," it is incumbent upon the buyer to ascertain her actual condition before bidding, and any loss occasioned by his failure to do so is imputable to him. As no claim of misapprehension of the terms of sale was made in this case until nearly two months after the sale had taken place, and after repeated demands and promises to pay, there is reason at least for saying that no such apprehension existed. While it is quite possible that Murphy might be held responsible as the principal in this purchase, it does not follow that the

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agent may not also be made liable. This is one of that not infrequent class of cases where the other party may look either to the principal or the agent.

The case is very similar to that of *Brasher v. Van Cortlandt*, 2 Johnson's Chan. R. 505, where an attachment was moved for against one Clay, for refusing to complete a purchase made on a master's sale. Respondent showed cause, by stating that he was requested by one Van Cortlandt, to become a purchaser in his behalf; that it was then represented to him that it was intended to appeal from the decree, and the request for him to purchase was to prevent the possibility of loss, in case the decree should be affirmed, and that he became a purchaser from motives of friendship for Van Cortlandt. Chancellor Kent decided that he must complete his purchase.

It is not necessary here to determine whether the purchaser be entitled to such of the furniture and apparel of the tug as was in the possession of Demass at the time of the sale. Under general admiralty rule 8, the marshal could probably have compelled the delivery to him of this property, but not having done so, it is very doubtful whether it is not now too late; still, it is no reason for the bidder refusing to complete his purchase. The announcement was distinctly made and understood, that the sale embraced only the tug and such of her equipment as was actually upon her, and he cannot now question the proceedings by reason of failure to deliver other property. While it is true, as Murphy swears, that he may have expected the marshal to deliver all the tug's appurtenances, which it seems he had seen in Livingston's warehouse not long before, he had no good reason to expect it, and took his chances of disappointment.

The practice of withdrawing from purchases thus made has become so common as to operate as a serious inconvenience. In several cases re-sales have been ordered at a greatly increased charge for advertising and ship-keeping.

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The attendance, too, is usually much less numerous at a resale, the bidding less spirited, and the property is often sacrificed for much less than it brought at first. As observed by the chancellor in *Lansdown v. Eldon*, 14 Vesey, 512: "A purchaser ought not to be permitted to baffle the court in this way." I think the proper practice is, for the marshal, before adjourning the sale, to require an instant deposit of at least one-tenth of the amount of the bid, giving the purchaser twenty-four hours thereafter to raise the residue. The purchaser would ordinarily prefer to make good his bid rather than incur a forfeiture of his deposit. While in this case the purchaser has been guilty of no fraud or moral wrong, and probably acted through mere inadvertence, still, as the sale was fairly made, I think it a case where the court is properly called upon to enforce it.

An order will be entered that the purchaser pay the amount of his bid in six days, or that an attachment issue.

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DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—JUNE
TERM, 1877.

MARINE TORTS—ADMIRALTY JURISDICTION.

1. The master of a scow took possession of a lighter, having no authority therefor, and used her in carrying wood off the shore of Lake St. Clair to the scow, but neglected to return her: *Held*, The court of admiralty has jurisdiction, and the scow is liable *in rem* for the conversion.

2. Though originally seized in a fish pond staked off from the Detroit river, yet as the scow employed the lighter in its service upon navigable waters she is liable.

Libellant, being the owner of a lighter, averred that the master of the scow had, without authority, seized and used his lighter and neglected to return her, though requested so to do. He claimed \$60 damage, and also the rental value of the lighter from the time of seizure, April 15, 1875, to the filing of his libel. Exceptions were taken to the jurisdiction on the ground that the facts did not constitute a lien upon the scow by the admiralty law. The principal allegations in the libel were denied in the answer, and it was claimed that the lighter had been detained by a ship carpenter, who had been directed by the libellant to put certain repairs upon her. The facts were that while the vessel was in a sunken condition the claimant applied to a brother of libellant for permission to use the lighter in carrying off wood to the scow. This the brother, Wallace Lemaire, granted without authority. The claimant used her two or

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three days only; left her lying near the lake shore where she pounded and became leaky. It was agreed, on demand made by libellant for the lighter, that she should be left at a ship carpenter's to be repaired. After this was finished the carpenter refused to deliver her to libellant, who filed this libel to recover her value.

Geo. W. Moore, for libellant.

H. A. Swan, contra.

BROWN, J.—The principal question discussed upon the argument related to the jurisdiction of the court. The libel sounds in *tort*, and it was strenuously insisted by claimant's advocate that no lien attached to the scow for the conversion of the lighter, both parties conceding that claimant took possession of her without authority from the owner. Cases of spoliation and damage are of admiralty and maritime jurisdiction. These include illegal seizures or depredations upon vessels or goods afloat. Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort, and as such belongs to the admiralty jurisdiction.¹ Benedict, §§ 310, 311. And the owners of a vessel are liable for torts committed by the master in the course of his employment.

There can be no doubt that if this were a case of contract—that is, if the agent of whom the claimant hired the scow, and whom claimant in good faith believed to have authority to loan it, had in fact possessed that authority, a libel *in rem* could have been sustained for the use of the lighter. A person furnishing a small boat or a lighter for the use of a vessel has as valid a lien upon her as though he had furnished an anchor, a compass, a chronometer, or any other of the articles usually denominated materials. In the case of *The Dick Keys*, 1 Bissell, 408, Mr. Justice McLEAN held that,

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where the master of a steamboat, on her behalf, agreed to pay \$20 per day for the use of a barge, a libel might be maintained against the steamboat for the amount. Mr. Parsons says, (2 Parsons on Shipping, 148:) "If a barge is necessary to a steamboat, its hire to it will be regarded as material furnished for its equipment;" citing *Amis v. Steamboat Louisa*, 9 Mo. 621; *Gleim v. Steamboat Belmont*, 11 Mo. 112; *Steamboat Kentucky v. Brooks*, 1 Greene, (Ia.) 398—cases which fully sustain the text of the learned commentator.

Now, upon principle, it is difficult to say why, if an action *in rem* will lie for the use or value of property *lawfully* obtained, a similar action will not lie for the use or value of property *unlawfully* obtained; in other words, where the wrong is greater, the remedy should not be less. The general rule with regard to torts seems to be, that the owners and the vessel are liable for all the acts of the master done in the execution of the business in which he may be employed, by which third persons are injured, whether the injury was occasioned by the unlawful acts or by the negligence or want of skill of the master. *Dias v. The Revenge*, 3 Wash. 262; *Dean v. Angus*, Bee's Admiralty, 369; *The Martha Ann*, Olcott, 18. The principle underlying these decisions is that, for torts committed in the business of the master as such, or in which the ship is the active, the injuring or the benefited party, the injured party has his remedy as well against the vessel as against her owner and master. The mere fact that the person committing a tort is master of a vessel, of course, does not make her liable; but, if it be an act done in pursuance of his business as master, or is beneficial to the vessel, she becomes liable *in rem*. The English cases hold that the vessel is not liable for a willful collision. This doctrine, however, is denied in the case of *Ralston v. The State Rights*, Crabbe, 22, where a libel was sustained for running

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down the libellant's vessel, done by the express direction of the master of the colliding vessel.

It is further insisted in this case that, locality being the test of jurisdiction in cases of tort, the injury was not done upon navigable waters, but that the lighter was seized within a fish-pound staked off from the river. I do not regard this fact as material. In the case of *Plummer v. Webb*, 4 Mason, 380, a libel was sustained for the abduction of a minor son upon a voyage upon the high seas. Mr. Justice STORY observed: "Here it is true that the tortious act, or cause of damage, might be properly deemed to arise in port; but it was a continuing act and cause of damage during the whole voyage; it was in no just sense a complete and perfected wrong until the departure of the vessel from port, and it traveled along with the parties as a continuing injury through the whole voyage, and terminated only with the death of the son at sea." See, also, *Sherwood v. Hall*, 3 Sumner, 128. In the case of *The Bark Yankee v. Gallagher*, (McAllister, 467,) the court held that, "if the tortious act originates in port, and is not a perfected wrong until the vessel leaves the port, it is a continuous act, and travels with the *tort-feasor* and the injured party during the whole voyage, and comes within the jurisdiction of the admiralty upon the principle that, if the thing be done on the high seas and brought to land, it is appropriate to a court of admiralty to decide the question as a maritime tort." In this case the libellant had been seized in the city of San Francisco by a vigilance committee, and carried on board the bark and landed in the Sandwich Islands. In the case at bar, admitting that the fish-pound was a not navigable water, the lighter was taken to the scow then lying in navigable waters, and was used by her there, and I think the case falls within the authorities above cited.

No willful misconduct or wrongful purpose on the part of

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the claimant need be shown; for the gist of the action is the use of the lighter by the vessel, and I hold that it makes no difference whether the claimant became possessed of her by a contract, or by an act which was technically a conversion. The exception to the jurisdiction must therefore be overruled.

Ouillette, the owner of the scow, took possession of the lighter without authority from the libellant. After he had her for some time, and she had been injured either by Ouillette's negligence in allowing her to pound upon the bottom, or by becoming leaky, libellant went to Ouillette and demanded that the lighter should be returned to him in good order. Ouillette then put her into the hands of a carpenter, who repaired the damages done her, and also made some alterations and repairs on her at the request of the libellant. When libellant went to the carpenter to demand her, he refused to give her up, either until the repairs put upon her by Ouillette's directions were paid, as libellant says, or until libellant would release Ouillette from all liability, or would clear Ouillette of the law, as the carpenter says. As it is clear that libellant offered to pay for the repairs which he had ordered, and the carpenter did not detain her upon that ground, his further detention of her must be attributed to Ouillette, notwithstanding his statement that the carpenter detained her without authority from him. It was the duty of Ouillette to see that the lighter was returned, and no excuse for the non-performance of that duty, not attributable to the libellant, can be accepted.

There is considerable conflict with regard to the value of the lighter; but, upon all the testimony, I think that \$45 is as much as she is worth. There must be a decree for the libellant for this amount, with interest.

See, also, *Tillmore v. Moore*, Dist. Md., Nov. 8, 1880; *The Chas. Morgan*, (this volume,) and *The Garland*, (by BROWN, J.,) E. D. Mich., Feb. 21, 1881. *Fed. Rep.* Vol. 5, 924.

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THE CITY NATIONAL BANK OF PADUCAH v.
THE CITY OF PADUCAH AND H. H. MORGAN,
TAX-COLLECTOR.

CIRCUIT COURT—DISTRICT OF KENTUCKY—JUNE 1, 1877.

1. **TAXATION OF SHARES OF NATIONAL BANK ENJOINED—BANK A PROPER PARTY WHEN.**—To a bill in equity a bank is a proper party complainant when it is sought to enjoin the collection of a tax upon its shares assessed against its stockholders, if it appear that the bank would be subjected to a multiplicity of suits and its business be interfered with, its stock be depreciated and its credit impaired.

2. **GROUND OF INJUNCTION IN SUCH CASES.**—An injunction may be had to stay the collection of a tax on personal property, if the enforcement of the tax would lead to a multiplicity of suits, or where the law authorizing the tax is invalid.

3. **RATE OF TAXATION ON NATIONAL BANK SHARES.**—Where different rates of taxation are imposed under the laws of a State or municipal government upon different classes of moneyed capital, it is not lawful to tax the shares of National banks at the highest rate imposed upon any class, regardless of the proportion which that class bears to other classes; nor is it confined to the lowest rate upon any class. And where different rates of taxation are imposed upon different classes of moneyed capital the rate of taxation on National bank shares should not exceed the rate imposed upon shares in State banks.

4. **DIFFERENCE OF TAXATION—RATES.**—The banking capital of Kentucky paid only fifty cents per share as a tax. One of the State banks was located in Paducah whose capital exceeded that of all the National banks there: *Held*, that an ordinance which imposed a tax of \$1.05 per share nominally on all banks but, from the payment of which the State banks had been adjudged exempt, was an unlawful discrimination against the National bank, and invalid.

5. **FURTHER.**—Where other moneyed capital was also taxed \$1.05 but a reduction to the whole amount of the owner's indebtedness was to be made before the assessment, and no such deduction was allowed where the capital consisted of National bank shares, the tax upon such shares was declared invalid.

6. **DOUBLE TAXATION.**—It was further held that as the value of the real estate held by the bank was not deducted, it was subjected to double taxation, and the tax was invalid.

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Bill filed against the city and tax collector of Paducah to enjoin the collection of a tax upon National bank shares. The Legislature in 1867 passed an act to tax the shares of National banks, but provided that the same should not exceed that upon State bank shares. The amount so assessed under the State law was fifty cents per share. This amount complainant had paid for years to the State on its shares.

The city of Paducah in 1871 levied a tax of \$1.05 on all bank shares. This was under the provisions of an ordinance passed by its common council, deriving its authority from the amended charter. The tax applied to State as well as National banks, but the courts of Kentucky decided that as to the State banks the tax was invalid. This tax was assessed for the year 1875, and the books were in the collector's hands when this bill was filed.

C. S. Marshall, L. D. Husbands, J. W. Bloomfield and Henry Burnett, for complainant.

J. Q. A. King, J. C. Gilbert, James Campbell, Jr., W. D. Greer and E. W. Bagby, for defendants.

The facts are stated in the opinion.

BROWN, J.—Upon the threshold of this case, we are confronted with the objection that, inasmuch as the tax in question is laid upon the individual shareholders, the bill cannot be maintained in the name of the bank; that the suit is one which concerns the stockholders only, and that they are the only proper parties complainant. Though this question has been raised before the Supreme Court several times, it has never been directly passed upon. In *Dows v. The City of Chicago*, 11 Wall. 108, the bill was filed by a stockholder simply upon the ground of the illegality of the tax. The bank itself filed a cross-bill, also alleging the illegality of

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the tax assessed on various grounds; and averring that if the share were permitted to be sold, irreparable injury would not only be done the shareholders, but also to the bank, which would be thereby subjected to great loss of standing, and other injury, for the redress of which the law afforded no remedy; and that such also would be the result if the bank paid the taxes, and was subject to suits by each of the shareholders by reason of so doing; and that in either event a multiplicity of suits would be rendered necessary to adjust the rights of the parties. A demurrer was interposed to both bills, and both were dismissed; the original bill because it was based solely upon the ground that the tax was illegal, and the cross-bill because it must share the fate of the original. The court intimated, however, that if the cross-bill had been an original bill, with like averment, it might have been sustained, to avoid a multiplicity of suits. The question appears to have been fully argued in *Tappan v. The Merchants' Nat. Bank*, 19 Wall. 490, under an allegation in the bill similar to the one under consideration, and to have been ruled by the Circuit Court of Northern Illinois in favor of the jurisdiction. *Union Nat. Bank v. Chicago*, 3 Biss. 82. In the Supreme Court, the case went off on another point, and the court expressly declined to pass upon this question. The only case I have found in which the jurisdiction was denied is that of the *First Nat. Bank of Hannibal v. Meredith*, 44 Mo. 500, where, notwithstanding the taxes were assessed against the bank and sought to be collected by seizing and selling all the shares comprising the capital stock, the court declined to interfere on the ground that an injunction to restrain the collection of the tax was not the proper remedy, unless the sale of the property was accompanied by irreparable damage. Incidentally, the court remarked, that the plaintiff had no equity, for the reason that its property was not in jeopardy; that the bank, as a corporation, would lose

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nothing if the shares of its stockholders were sold, and that its shareholders, if any one, were entitled to relief. The point, however, does not seem to have been maturely considered, and, indeed, it is doubtful whether the petition in that case, charging as it did, not an impending multiplicity of suits, but that the sale of the shares, would greatly damage the bank, by impairing its credit and stability, and injuring the owners of the stock, by casting a cloud over the title and destroying its convertability, made out a case for relief.

The bill under consideration alleges, and the evidence meets, substantially, the averment, that the city is threatening to sue the bank and each of its stockholders, in separate suits, and will, unless restrained, sue out attachments garnishing the bank and attaching the stock of the shareholders, involving the plaintiff in a great many petty suits; breaking down the business of the bank, depreciating its stock, bringing endless confusion on the ownership of the same, injuring the credit of the bank, putting a cloud upon the same, and doing it an irreparable injury. That if the bank pays these taxes, the stockholders will sue it, and in either event, a multiplicity of suits will result. Upon the whole, I think the bank is so far the trustee of the stockholders, and the custodian of the dividends that it is entitled to maintain the bill. It might be subjected to great annoyance by stockholders, who denied the legality of the tax, and gave the bank notice that it would pay it at the peril of being sued by them. It is certainly no hardship to permit the whole question to be litigated in a single action.

We assume in this connection that all the stockholders in this bank, each having the same ground for relief, and the same defense being applicable to all, might have united in a single bill without multifariousness. (Cooley on Taxation, 545.) This being so, we see no objection to the bank main-

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taining a like bill as trustee for the entire body of stockholders. We should feel inclined to go to the limit of the law in sustaining a practice so convenient, and, so far as we can see, so unobjectionable.

It is also insisted that a remedy by injunction cannot be invoked in this case. While it is freely conceded that a court of equity has no general power to restrain the collection of taxes for any irregularity of assessment, or for overvaluation or unjust discrimination, and that to sustain a bill the case must be brought within some acknowledged head of equity jurisdiction, we think this exigency is met in either of the two following cases:

1. Where the enforcement of the tax would lead to a multiplicity of suits; or

2. Where the law authorizing the tax is itself invalid.

Upon the first ground the interference of a court of equity was held proper in *Heywood v. City of Buffalo*, 14 N. Y. 534, and in *Dows v. City of Chicago*, 11 Wall. 108, 111. The opinion in that case received the sanction of the Supreme Court of the United States. The second ground of interference was also recognized by the Supreme Court in the same case, approving *Cook County v. The Chicago, Burlington & Quincy R. R. Co.*, 35 Ill. 465. In the case of the same railway company v. Frary, 22 Ill. 34, speaking of exceptions to the general rule, that a court of equity will not interfere, it is observed, "Those exceptions are confined almost, if not entirely, to cases where the tax is unauthorized, or it is assessed upon property which is not subject to the tax. The case of the *Illinois Central R. R. Co. v. The County of McLean*, 17 Ill. 291, fell within the latter exception. The same rule is practically affirmed in *Munson v. Minor*, 22 Ill. 601, and *Central Warren Road Co. v. Black*, 32 Ind. 471. In *Warden v. Board of Supervisors*, 14 Wis. 618, an exception is mentioned of objections which go to the very ground-

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work of the tax assessed, so as to affect materially its principle and to show it must necessarily be illegal. "Where it appears that the *established principle* of taxation has been violated, and that *actual injustice will ensue*, or that the tax is levied for an unauthorized purpose, of course equity will interfere, in proper cases, to prevent the wrong." (See High on Injunctions, 195-200.) Both of the reasons above given for the exercise of equity jurisdiction, are apparent in this case, and we think the complainant has not mischosen its remedy. While in a case of over-valuation, or unjust discrimination an appeal to the supervising officers might correct the error, they would have no power in a case like this to question the validity of the ordinance by virtue of which the tax was assessed.

Coming now to the vital point in this case, viz: The validity of the legislation by which the tax in question was imposed, we find the general proposition firmly established, that banks organized under acts of Congress are regarded as fiscal agents of the government and exempt from taxation, except as Congress may specially authorize it. *McCulloch v. Maryland*, 4 Wheat. 416; *Weston v. The City of Charleston*, 2 Pet. 448; *Farmer's Bank v. Dearing*, 91 U. S. 34.

In the organization of National banks, Congress has given a qualified authority for State taxation in the following section of the Revised Statutes:

SEC. 5219. "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations, located within the State, subject only to the two restrictions, that

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the taxation shall not be at a greater rate than is assessed upon *other moneyed capital in the hands of individual citizens of such State*; and that the shares of any National banking association, owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes to the same extent, according to its value, as other real property is taxed."

While the section in question would not be open to construction if the entire moneyed capital of the State, in the hands of individuals, were taxed at a uniform rate, the interpretation to be put upon it, where different rates of taxation are imposed upon different classes of moneyed capital, is not free from doubt. Has the State a right to tax the shares of National banks at the *highest rate* imposed upon any class of moneyed capital, regardless of the proportion which that class bears to other classes? On the other hand, is it confined to the *lowest rate* imposed upon any class of moneyed capital; with like disregard of the relative amount of the different classes? The last question is answered directly, in the case of *Hepburn v. The School Directors*, 23 Wall. 480, in which it was proved that mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate were exempt from taxation in a certain district, except for State purposes. This was held a partial exemption only, and it is said it cannot be the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt. Suppose, however, there were in a certain district a very small amount of moneyed capital of one species and a very large amount of another; that the former was heavily taxed and the latter exempt altogether, would the municipality be authorized to tax the shares of National banks at the rate imposed upon

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the former? Suppose, for example, that State banks, exempted from taxation, absorbed three-fourths of the "other moneyed capital" of a certain city, and the remaining one-fourth was heavily taxed, would it not be not only an unjust discrimination but a mere evasion, to tax the shares of National banks at the rate imposed upon the taxed quarter? These questions have never been definitely settled, but bearing in mind that the obvious intention of Congress was to permit taxation, but to inhibit unjust discrimination, it would seem the answer would be easy. I regard the true construction to be this: That when by local legislation different rates are prescribed for different classes of moneyed capital, the rate imposed upon shares in national banks should approximate as closely as may be to the rate imposed upon other moneyed capital of the same or similar class, viz., shares of State banks. While this rule might be subject to qualifications in localities where the capital of State banks bore a very small proportion to other moneyed capital, and the exemption was intended as a bounty, I think it furnishes, as a general rule, a safe guide to the validity of the tax.

It is urged, however, that the course of legislation upon this subject repels the inference here drawn from the language of the section, and shows, affirmatively, that Congress intended to permit the States to discriminate in favor of their own banks, by repealing a proviso inhibiting such discrimination, originally annexed to the section in question. The 41st section of the original act of 1864, 13 Statutes, 112, provides that "nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate from being included in the valuation of personal property of said person or corporation, in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other

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moneyed capital in the hands of individual citizens of such State: *Provided*, That the tax so imposed under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located: *Provided, also*, That nothing in this act shall exempt the real estate of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real estate is taxed." In 1868 a short act was passed (15 Statutes, 34) not amending, but explanatory of the 41st section, entitled, "An Act in Relation to Taxing Shares in National Banks." The language is as follows: "That the words 'place where the bank is located, and not elsewhere,' in section 41, etc., shall be construed and held to mean the State within which the bank is located, and the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *And provided always*, That the shares of any National bank owned by non-residents of any State, shall be taxed in the city or town where said bank is located, and not elsewhere." The intent of Congress was manifest. A difference of opinion had arisen with regard to the meaning of the words "place where the bank is located," and in some States the assessing officers were taxing the shares in the town or city where the bank was located, notwithstanding that the owner lived in a different town or city in the same State. To define the meaning of these words was the sole object of the act of 1868. This is evident, not only from the language of the act itself, but is an actual fact—(though possibly it is not a legitimate argument here)—as appears from the remarks of the chairman

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of the committee which reported the bill. (See *Congressional Globe*, 2 Session, 40th Congress, p. 921.) The two provisions in the original act were neither of them alluded to in the act of 1868, although out of abundant caution the words "the taxation shall not be at a greater rate than is assessed upon other moneyed capital" were repeated, and an entirely new proviso added, that the shares of non-residents should be taxed in the city where the bank was located. There is certainly no express repeal of the two provisos in the original act, and nothing from which an implication of repeal can arise. Were it not for the Revised Statutes, I should hold both the provisos in the act of 1864 to be still in force. I am aware that in the case of *Lyonberger v. Rouse*, 9 Wall. 468, Mr. Justice DAVIS indicates an opinion that under the act of 1868 the power of State taxation was subject only to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital;" but the point does not seem to have been argued, and was unnecessary to the decision of the case. In the revision, the second proviso, that the real estate of the bank should remain subject to taxation, is retained; while the first, limiting the tax expressly to the rate imposed upon the shares of State banks, was omitted. If there were anything in the act of 1868 which could be construed as a repeal of the first proviso, I see no reason why it should not operate also as a repeal of the second; but, as observed before, I think the two acts should have been construed harmoniously, and the restriction in the act of 1868 should not have been regarded as exclusive as those in the former act, while the omission of the first proviso in the Revised Statutes undoubtedly operates, under section 5596, as a repeal of such proviso; yet considering the manner in which the repeal was effected, I think no intent can be inferred on the part of Congress, thereby affirmatively to permit States to subject the shares of National

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banks to a greater rate of taxation than they impose upon State banks, if any such intent could ever arise from the repeal of a prohibitory clause. So far as the question arising in this case is concerned, section 5219 should be construed precisely as if no prior legislation on the same subject had been had.

The ordinance of Paducah nominally imposed a tax of \$1.05 upon all banks within its limits, State as well as National, but as there is but one State bank in the city, viz., the Commercial Bank, which is exempt from taxation beyond fifty cents per share, and a possible tax of fifty cents on each hundred dollars of its contingent fund, which seems never to have been collected, the tax is really applicable only to the three National banks, the aggregate capital of which is less than the capital of the Commercial Bank. It is true an attempt was made to assess the same tax upon the Commercial Bank, but an injunction against its collection appears to have been granted and perpetuated by the State Court. I feel authorized, then, to treat it as exempt from this tax. That the Commercial Bank is not exceptionally favored in this particular, is shown by the certificate of the Auditor of Public Accounts of the State, which is in evidence and exhibits a complete list of all banks doing business under the laws of Kentucky. They are fifty-three in number, having an aggregate capital of \$12,473,641.50, and each pays the State a tax of fifty cents on every hundred dollars of its Capital, in lieu of all other taxes, though there are slight variations in the different charters. If there are any State banks, the taxation of which is not regulated by their charters, they fall within the general provision of chapter 92, article 2, section 1, "on bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof, equal to one hundred dollars." The result is the same in either case, a few apparent exceptions being set forth in the

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answer; but practically the entire banking capital of the State is subject to a tax of fifty cents per share on one hundred dollars, in lieu of all other taxes. If the city of Paducah may tax National banks at \$1.05 per share for the year 1875, it may increase the tax at any time to \$2.50, the amount authorized by the Legislature, and to as much greater an amount as the Legislature may hereafter see fit to authorize. (It was conceded upon the argument that the tax for 1877 had been increased to \$1.40.) Indeed, the Legislature may authorize like taxation by every municipality in the State, while the State banks under their special charter will escape the burden altogether. Certainly here is a large discrimination in favor of State banks. I am not unmindful in this connection of the case of *Lyonberger v. Rouse*, above cited, nor of the case of *Hepburn v. School Directors*, 23 Wall. 480, in which it was held that the exemption of small amounts of moneyed capital, in particular cases, would not invalidate the tax, if the great body of moneyed capital was subjected to it. In both these cases, however, the amount exempted was small in proportion to the aggregate amount of moneyed capital, and the great mass of moneyed property was subjected to the same tax levied upon the shares of National banks. It is true that the fifty-three State banks in Kentucky are not chartered by general law, but by special acts in each case; but this seems to me to make no difference. The *fact* remains that practically the entire banking capital of the State pays a tax of fifty cents in lieu of all other taxes, even upon its real estate. The law will look, not at *the manner* in which the tax is imposed, but at *the result* of the system. A like answer may be made to the argument that many of these State charters have expired, and that in renewing them the power to increase the taxation is reserved. This power never seems to have been exercised.

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It is insisted, however, that although the legislation in question may discriminate in favor of State banks, there is no discrimination against National banks, inasmuch as "all other moneyed capital, in the hands of individuals," except shares in State banks, pays the same tax. Under the general laws of Kentucky (and the charter of Paducah adopts the same rule of assessment) property subject to taxation is listed in five classes:

1. Real estate; 2, horses, mules and the like; 3, cattle; 4, watches, plate, clocks, pianos, vehicles and harnesses; 5, "the assessor after having taken the lists of all property required to be taken listed as above, shall require each person on oath to fix the amount he or she is worth from all other sources on the day to which said list relates, *after taking out his or her indebtedness from said amount*; and the said assessor shall take from the said amount the sum of one hundred dollars, and list the balance for taxation." This section includes all property not exempt or previously mentioned, such as spirituous liquors, the produce of mines, farms, forests, manufactures, notes, accounts, bonds, bills of exchange and choses in action, debts and demands of every kind, but does not include bank stock. The whole amount of this fifth class, in which "other moneyed capital" is included, in the city of Paducah, is shown by the assessor's books to be in all \$303,865. From this must be deducted all which is not moneyed capital. The residue, consisting of money on deposit, notes, bonds, mortgages, judgments and other choses in action, is the only "other moneyed capital," and the amount of this it is impossible to ascertain, as it is nowhere listed or taxed *as such*. A liberal estimate would probably not place it over \$200,000. Upon this the tax of \$1.05 is imposed, subject, however, to a deduction of *all the indebtedness* of the tax-payer. If, then, the property of the tax-payer consists of National bank stocks, pur-

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chased by him and for which he has given his note for the full amount, he pays, notwithstanding, the tax of \$1.05 per share; but if his property consists of any other moneyed capital, and his debts are equal to the value of the capital, he pays nothing. It is true, exact uniformity can never be attained, but the law requires at least an approximation to it, else the proviso in the Revised Statutes is useless. While the tax is legal, if laid at the same "rate" as other moneyed capital is taxed, (and it may be said to be uniform if the rate is uniform,) yet uniformity of rate presupposes uniformity of valuation. If, for instance, State bank stocks were appraised at their par value and National bank stocks at their cash value, there would be no real uniformity of rates, though the percentage might be the same in both cases, since the cash value might be half or double the par value. This principle is recognized in the *Railroad Tax Cases*, 2 Otto, 611, where the tax was sustained upon the ground that the rate imposed on railroad property was no greater than that upon other property, and the valuation was assessed upon the same principle which was applied to the property of individuals. Although by the term moneyed capital in section 2519, is meant taxable moneyed capital, yet this must be understood only as distinguishing a class of capital which is taxable from another, which, from motives of public policy, is exempt. All moneyed capital listed under the fifth subdivision of the equalization law belongs to the class of taxable moneyed capital, made the basis of comparison in section 2519; but if in the hands of "A." this capital is taxed, and in the hands of "B." it is not taxed, because he is in debt to its full value, like discrimination should be made if this capital consists of National bank stock, or the tax is not uniform. The Legislature may discriminate *among different classes* of capital without violating the requirements of uniformity, yet as between individuals of *the same class* the burden must be

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laid equally. It cannot tax A. and exempt B., if the property is of the same class. Now the act of Congress classifies National bank stock with other taxable moneyed capital, and inhibits discrimination against it and in favor of other moneyed capital. If a deduction of debts is allowed in one case, it should be in the other, or there is no uniformity.

Nor is this discrimination likely to work a hardship only in rare instances. Most business men, among whom bank stock is principally owned, are more or less indebted, and the system which permits the debts of one to be deducted and not those of another can hardly be said to be uniform. It is true the deduction of this indebtedness may be practically impossible so long as the shares of banks are listed under the equalization law above quoted; but this is an argument to show, not that the tax is uniform with that levied upon other moneyed capital; but that the rule announced earlier in this opinion, that the taxation of National banks should conform to that of State banks, is the only one under which taxation can be practically and uniformly imposed.

Another want of uniformity exists in the fact that no provision is made for the deduction of the value of real estate from the aggregate value of the shares. The laws of Ohio, and it is believed of other States, require the appraised value of the real estate to be deducted from the actual total value of the shares before they are listed for taxation. Without such provision, a double tax is paid upon the value of the real estate, from which other moneyed capital is exempt.

I lay no stress upon the deduction of one hundred dollars allowed by the equalization law, or upon the fact that shares owned by colored people may be taxed for the support of common schools in violation of the law applicable to other moneyed capital. These exemptions fall within the rule laid down in *Hepburn v. School Directors* and *Everitt's Ap-*

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peal, 71 Penn. St. 216, and do very little to disturb the practical uniformity of the law. *De minimis non curat lex.*

But from whatever point of view this case is considered, the fact is apparent, that by the ordinance of Paducah a large tax is imposed upon the shares of National banks, from which the banking capital of the State is wholly exempt; and though the percentage is nominally the same, the tax is far more onerous than that laid upon other moneyed capital in the city. For these reasons, it seems to me the legislation is in conflict with the act of Congress, and therefore invalid.

A decree will be entered perpetuating the injunction.

UNITED STATES *EX REL* OF WEEDEN *ET AL.*

CIRCUIT COURT—DISTRICT OF KENTUCKY—JULY 11, 1877.

STATE AND FEDERAL JURISDICTION—CRIMINAL ACTS—HABEAS CORPUS, ETC.—UNITED STATES OFFICERS EXECUTING PROCESS—PRACTICE—WHEN THE FEDERAL OFFICIAL WILL BE REMANDED TO THE STATE COURT.

1. A Federal officer, executing process, when actually innocent of the crime imputed and justifiable in all that he really did, is not obliged to show, in order to procure his discharge, that he has done nothing except what he was justified in doing by process, nor to show that he was justified in doing the very thing imputed to him, and for which he is in confinement.

2. The doctrine laid down in 2 Abb. 266, modified.

3. When on *habeas corpus* the evidence does not show the shooting was done in order to enable the officer to execute the process in his hands, the Federal Court will not discharge the prisoner but turn him over to the State Court there to stand his trial.

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The relators were arrested by the sheriff of Barren county, Ky., in May, 1877. They were charged with the offense of willfully and maliciously shooting at and wounding Thomas Reynolds and Isaac Reynolds, etc. A petition was presented to the court on the part of each relator, which alleged that although he was, ostensibly, in custody for the offense above stated, he was, in truth, in confinement for acts done in his capacity as a deputy marshal of the United States, or his posse, and in pursuance of the law of the United States and of process of a judge thereof; and praying for a writ of *habeas corpus*. The writ was granted in each case, and the return of the sheriff discloses the warrant aforesaid. The return was traversed by the several relators; they reiterating the allegations of their several petitions.

The facts show that on the 5th day of May, 1877 (at night) the relators were proceeding on the public highway in Barren county, having the prisoners in custody, and who had been arrested under regular warrants, when Weeden turned out from the road and stopped at the dwelling of one Reynolds, ostensibly to get a drink of water, but, in fact, as he alleges, to arrest one Foster, for whom he had a warrant also. Calling for water, he indulged in some offensive language towards one of the Reynolds', when he was assaulted by the two. He discharged his pistol, twice, and wounded both men.

Moss, Attorney General for the State, cited *Ex parte Lange*, 18 Wall. 166; *In re McDonald*, 11 Blatchford, C. C. R. 189; *United States ex rel of Roberts v. Jailor of Fayette Co.*, 2 Abb. U. S. R. 266.

BALLARD, J.—I can discharge Weeden only on its appearing that what he did was done *under* and by *virtue* of the warrant in his hands. The evidence before me does not

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justify me in finding the shooting was done in order to enable the officer to execute the process in his hands, and as I cannot so find, I cannot discharge him. He must be remanded to the State Court there to stand trial. He may be excusable for what he did—he may have acted in self-defense—but these matters belong solely to the State Court, and the jury there. Being an officer of the United States furnishes no immunity for violating State laws. The State Court has jurisdiction to try him. I claim the right only to pronounce on the fact whether or not what he did or is accused of doing, was justified by the process in his hands.

The other relators were not present at the shooting or in any way connected therewith, but were on the highway with the prisoners in their custody, arrested under due process, and unconscious of the shooting, except as their attention was attracted by the pistol shots. They did nothing which they were not justified in doing by the process in their hands. They must be discharged.

In writing the opinion in the *Case of Roberts*, 2 Abb. 266, I was inclined to think that a Federal officer was not entitled to claim his discharge by simply showing that he had done nothing except what he was justified in doing by process, but that he was obliged to show that he was justified by his process in doing the very thing imputed to him, and for which he was in confinement. I am constrained, in deference to authority, to modify what that opinion indicates would be my action, when it appears that the officer is actually innocent of the crime imputed, and was faithful in doing all that he really did. *Ex parte Jenkins*, 2 Wall. 537.

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THE SOUTHWEST AND THE L. P. SMITH.

DISTRICT COURT—NORTHERN DISTRICT OF OHIO—AUGUST,
1877.EMPLOYMENT OF THE TUG FOR TOWING—LIABILITY IN CASE OF
COLLISION.

If a vessel employ a tug in general terms to tow in and land her at a particular place, the undertaking of the tug necessarily is that it will use the proper skill and ability to perform the service; and it has the right, and it becomes its duty as well, to direct the vessel that is towed, and to manage the helm, to the end that such vessel may aid in accomplishing the task entered upon, viz., making the landing.

Willey, Terrell & Sherman, proctors for libellants.

C. L. Fish, proctor for defendant tug, and *Grannis & Burton*, proctors for defendant schooner.

The facts are fully stated in the opinion.

WELKER, J.—This is a libel filed by the owners of the schooner *Young America*. It states that the schooner *Young America* was lying at Swain's wharf in the Cuyahoga river, and that the tug *L. P. Smith* had the schooner *Southwest* in tow, for the purpose of landing her at said wharf alongside of the *Young America*, and that in landing the schooner *Southwest* alongside of the *Young America*, the latter was injured by the collision.

The question raised in the evidence and on the trial is, whether the schooner *Southwest*, or the tug, is to be held

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liable for the injury sustained by the Young America. The libel was filed by the owners of the Young America against both of these vessels, and the controversy arises between the tug and the Southwest as to which was at fault, and occasioned the collision by which the damage resulted.

This tug was employed, as the evidence shows, for the purpose of towing into the Cuyahoga river and landing at the wharf, the Southwest. There is no evidence showing that any special arrangement was made as to how the Southwest should be landed. In every enterprise like this, the towing of a schooner from the lake into the harbor, there must be some one of the parties that will be in command, and held responsible for the proper execution of the duty.

The duty to be performed by the tug was to bring in from the lake the schooner Southwest, and land her at the place designated. It is claimed by counsel for the tug that the Southwest was at fault; that she had, to a great extent, the control of the operations of the tug; and it is claimed by counsel for the Southwest that the tug was in command of the expedition, and that the Southwest was under the orders of the tug, and if the tug gave orders that were improper, or orders that were obeyed by the schooner and injury resulted thereby, it was the fault of the tug.

Experts were called, during the trial of the case, for the purpose of enabling the court to ascertain the rule governing this class of crafts in the performance of such duties, and what seemed exceedingly curious, some stated that the tug was the commander of the expedition, and as many stated that the schooner was the commander of the expedition, and it is therefore very difficult to determine the rule from their testimony.

It is conceded on all hands that both of these vessels could not have been in command, because, if the captain of the schooner had the right to his sail, and the captain of the tug

had the right to his sail, they might not have agreed in the mode and manner in which, or when, the vessel was to be landed. Some one must have the right to direct and control. I presume that might be regulated by contract; but I am clearly of the opinion that where there is a general employment by a vessel of a tug to tow her in, and land her at the particular place designated, that the tug necessarily undertakes to bring with it the necessary skill and ability to perform that service, and that it has the right, and is its duty to direct the schooner in the management of her helm, so that she may aid in making the landing sought to be accomplished. For it will be borne in mind, that a schooner coming into the mouth of the Cuyahoga river, is an entirely helpless thing, excepting the operation she may perform with her rudder, which more or less controls her movements, and she has no motive power, except that which she receives from the tug.

But the question is who had the control and direction of the rudder in making that landing?

It is alleged on behalf of the schooner, that she was ordered at a certain place in the river to starboard her wheel, in order to allow the tug to back alongside and fasten on to her, to more easily accomplish the landing; and it is alleged on behalf of the tug, that immediately after the Southwest had starboarded her wheel, and the tug had got alongside of her, the order was given by the captain of the tug to the Southwest, to port her wheel in order to aid in getting at the proper place to land, and that the order was disobeyed. But it is alleged by the schooner that her wheel was ported as directed. If it were true, and sustained by the evidence—the tug having the right to give the order—that the captain of the schooner did not obey the order to port (and the witnesses all said it was necessary to port the wheel at that situation of affairs in the river) and an injury resulted there-

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from, then it would not be the fault of the tug. That is a matter of evidence that must be determined from the witnesses examined on the trial of the case. The testimony was somewhat contradictory on that subject; but applying the rules to the testimony that courts apply in the trial of cases, as to the knowledge of the parties that testified, it strikes me that there can be but little doubt that the captain of the schooner Southwest obeyed the order and did port his wheel. He knows all about it, his wheelsman knows all about it, and another party that was on the vessel, knows whether it was ported or not. It is a fact within their observation and knowledge rather than that of outsiders. It is true, that the captain of the tug testified, that he saw the captain of the schooner go to the wheel, at or nearly at the point of the collision, and put his wheel at port. The captain of the schooner denies that, and says that he went there for the purpose of seeing whether it was all right, and he found it was all right. That would hardly be enough to discredit the express and positive statement of the captain of the Southwest, of the fact that the wheel was put at port immediately after receiving the orders. If the wheel of the schooner was put at port as directed, then what else could she do? She was entirely under the control of the tug in her maneuvers for the purpose of landing. It is conceded by all the parties that if the tug had backed within a certain distance of the wharf, after she had fastened upon the vessel, that she could have been sheered so as to have avoided the collision.

The testimony on behalf of the Southwest is pretty strong to show that the tug did not back at all, and the witnesses on behalf of the tug, who were present and of course knew all that occurred, swore that they commenced to back as soon as they had made fast, and that because the helm was at starboard, and not at port, the tug did not get control of the vessel, so as to avoid the collision. I am inclined to think

that the evidence justifies me in saying, that the tug did back, but the difficulty about it is, it did not begin to back soon enough.

There is nothing in which witnesses can be easier mistaken than in time and distances on water. From the locality these vessels were in, there was not much space, and there was not much time to lose, in the backing operation in order to avoid the collision. At exactly what point the tug began to back and what effect it had, is a question about which witnesses might very easily be mistaken and might differ very materially.

It was the duty of the tug to back in time to avoid the collision, and the testimony of all the witnesses in relation to that matter is, that if the tug had commenced to back after the wheel was put at port, within a certain distance of the wharf, the collision could have been avoided. The tug having control of the motive power of the vessel, whether pulling the vessel along at a good speed or at a slow speed, is a matter that the tug must control in order to accomplish the landing at a certain place; and if the tug came up too fast, so that they could not land at the proper place without injury to the vessel, it was the fault of the tug.

In viewing this case in the whole, I am very well satisfied that the schooner did nothing that was faulty in her operations, and that the collision, happening as it did, must necessarily have happened by reason of the fault of the tug; and it seems to me that the outside evidence is very satisfactory to show that the tug did not manage the vessel as she ought to have managed her to avoid the collision.

The decree will therefore be against the tug, releasing the schooner Southwest.

THE ATHENIAN.

DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—OCTOBER 15, 1877.

SALVAGE—ITS RANK IN MARSHALING CLAIMS.

1. From proceeds of sale of vessel salvage is to be paid in preference to prior claims for seamen's wages.

2. The schooner got aground in the Detroit river, when the parties excepting to commissioner's report got her off. They claim the service as that of salvage, and are entitled to rank claims for towage and materials furnished.

Other facts are stated in the opinion.

F. H. Canfield and *Jas. J. Atkinson*, for the salvors.

Jno. C. Donnelly, for the seamen, and *Geo. E. Halliday*, for material men.

BROWN, J.—The only question in this case is whether the expenses of getting this vessel off Stony Island reef and towing her to Windsor are entitled to be paid in preference to the seamen's wages and the ordinary claims of material men. This claim is not for salvage in the strict sense of the word. There was no immediate danger to the schooner; there was no peril incurred by the salving vessel. The job was undertaken upon a contract for a sum certain, substantially like any other contract for towage services. Had the vessel been sunk at her dock, or at any other place where there was no reasonable probability of her suffering injury by remaining, I should not consider the claim as entitled to any particular favor; but, under the circumstances, I think the

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vessel was in a condition to have salvage services rendered her. She was fast upon the rocks, was leaking badly, and, indeed, was full of water; passing vessels caused her to sway back and forth; she was also subject to the action of a strong current, and a change of wind to the south-east might have created sufficient sea to have broken her up. While, as before observed, the case is not one of strict salvage, inasmuch as the hiring was by the day, and no peril was incurred by the salving vessel, I do not regard this fact as material in determining the nature of the service. The case is not one of ordinary towage, and, if not towage, it is salvage. The term "extraordinary or meritorious towage" made use of in some cases is misleading and of no practical importance. As distinguished from towage, salvage implies simply some degree of danger and some need of extraordinary assistance. As observed by Dr. Lushington in *The Reward*, 1 W. Rob. 174, 177: "I apprehend that mere towage service is confined to vessels that have received no injury or damage, and that mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in, without having encountered any damage or accident."

In the case of *The Westminster*, 232, he adds: "The degree of the danger is immaterial, in considering the nature of the service, for if the cargo at all required assistance to remove it to a place of safety, the service then assumes the character of a salvage service." See, also, *The James T. Abbott*, 2 Sprague, 101; *Baker v. Hemmingway*, 2 Low. 501. In the case of *The M. B. Stetson*, 1 Low. 119, the court remarks: "Speaking generally, it may be said that the mere fact that a vessel is aground, is enough to show that she is in a situation to have a salvage service."

While this language was not intended to apply to a grounding upon a mud bank in a river or harbor, which is an

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ordinary incident of navigation, I think it may be properly applied to any case where the grounding is attended with danger to the vessel, if she be suffered to lie there.

The case being one of salvage, libellants are entitled to be paid first, even before the seamen whose wages were earned prior to these services, since it is owing to their exertions that anything remains to which the lien of the seamen can attach. *The Selina*, 2 Notes of Cases, 18; *The Mary Ann*, 9 Jur. 94; *The Panthea*, 1 Asp. Mar. Law Cases, 133. The commissioners will amend the report by classifying the claims as follows: (1) Salvage services; (2) seamen's wages; (3) claims of tugs and material men, those of a later year ranking those of a former; (4) domestic claims.

THE FAVORITE.

DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—OCTOBER
15, 1877.

The court has power to order the re-arrest of a vessel if the stipulation to answer a judgment has been accepted by mistake or fraud and the sureties were never bound.

Motion for re-arrest of vessel, on the ground that she had been improvidently discharged from custody. It appeared that a stipulation had been accepted—the only surety upon which was a married woman who had no interest in the vessel.

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F. H. Canfield, for libellant.

H. C. Wisner, for the respondent.

BROWN, J.—That the surety in this case, being a married woman and having no interest in the vessel, is not bound by her stipulation, is too clear for argument, and in fact is conceded by counsel. *Devries v. Conklin*, 22 Mich. 255; *West v. Saraway*, 28 Mich. 468.

It is claimed, however, that the vessel having once been released from custody is forever discharged of the lien, and the court has no power to order her re-arrest. *The Union*, 4 Blatch. 90; *The Whitesquall*, do. 103; *The Kalamazoo*, 9 English Law and Equity, 587; *The Old Concord*, 1 Brown's Admiralty, 270. In none of these cases, however, was there any mistake or fraud at the time the stipulation was signed. In the *Union* and the *Kalamazoo* the amount of damages claimed in the libel was increased. In the *Whitesquall* the vessel was returned to custody by the consent of the parties, against the protest of a person having an interest in the vessel; and in the *Old Concord* the sureties had become insolvent. Conceding that the court has no power to order the re-arrest of a vessel once fairly discharged upon a binding stipulation or for any cause not existing at the time the stipulation was accepted, I am clearly of the opinion that this power exists, whenever through mistake or fraud a stipulation has been accepted which was not binding upon the parties signing it.

An order will be made for the re-arrest of the vessel.

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GIBSON v. CINCINNATI ENQUIRER.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—NOVEMBER,
1877.

MOTION FOR NEW TRIAL—VERDICT—INTEREST.

Verdict rendered in favor of plaintiff, but judgment delayed because of motion for new trial: *Held*, that on overruling the motion the plaintiff is entitled to judgment for the amount of the verdict and interest from the day it was rendered. And the rule applies as well to actions of *torts* as to those founded upon contracts.

The facts are fully stated in the opinion of the court.

SWING, J.—The plaintiff brought his action for libel against the defendant, and on the 16th day of November, 1876, the jury rendered a verdict in his favor for the sum of \$3,875. On the 17th day of November, 1876, the defendant filed a motion for a new trial. This motion was argued by counsel, and submitted to the court at the February term, 1877, and on the 15th day of October the court overruled the motion for a new trial, and ordered judgment to be entered upon the verdict for the amount thereof, with interest from the 3d day of October, 1876, being the first day of the term at which the verdict was rendered. See 5 Cent. L. J. 380, for a report of the opinion on that motion. On the 17th day of October, 1877, the defendant filed a motion to modify the judgment, for the reason that no interest should have been allowed upon the verdict until judgment was entered thereon.

It is insisted by the defendant that interest is the creature of the statute, and that this case does not come within its

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provisions; that the cause of action was not founded upon contract, but was an action for a tort, and that in such cases interest is only recoverable from the date of the judgment.

I think the Supreme Court of Ohio in *Haag et al. v. Zanesville Canal Co.*, 5 Ohio, 416, settled the doctrine that interest may be allowed as well in actions of tort as in those upon contracts. In that case, it is said that a jury may calculate interest upon the amount of damage actually sustained, and add it to their verdict. If the jury in fixing the amount due from the defendant to plaintiff, may give to him interest, certainly the law should give him interest upon the sum which they have returned in his favor, from the date of their verdict. And the Supreme Court of Virginia, in *Lewis v. Arnold*, 13 Grattan, 464, hold that in regard to interest upon the verdict there is no difference, in principle, between verdicts in actions for torts and upon contracts.

Upon the question of the right of the plaintiff to interest upon the verdict, I can see no difference between a verdict in an action for tort, and a verdict in actions sounding in contract—the verdict in either case fixed the amount due at the time of its rendition, and that amount the party is entitled to have paid him as of that date—and if the payment is delayed him by the act of the defendant, he ought to have interest. Such has been the practice of this court, and such seems to be the current of authority.

In *Sprant v. Cutter*, Wright, 157, interest was allowed upon an award from its date, and the court say: "And if it were the verdict of a jury, and judgment had been delayed, we should allow interest if asked." By the statute of Maine in relation to occupying claimants, it is provided that the court shall render for *the sum estimated by the jury*, but the Supreme Court of the State, in *Winthrop v. Curtis*, 4 Greenleaf, 297, held that the party was entitled to interest from the date of the verdict. The statute of New Hamp-

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shire, as ours, allows interest upon judgments without distinction as to the nature of the action in which the judgment is rendered; and the Supreme Court of that State, in *Johnston v. Atlantic & St. Lawrence R. R. Co.*, 43 N. H. 410, say: "No solid reason can be given for withholding interest between the finding of the jury and the rendering of the judgment," but inasmuch as the court below had refused interest, and no exception had been taken to the ruling, the writ of review was dismissed. The rule of the Supreme Court of Connecticut in relation to motion for new trials, is, in substance, that where execution is stayed by reason of reserving a cause on motion for new trial, if judgment be not reversed, interest shall be added to the judgment from the time of the stay. 18 Conn. 575. In *Weed v. Weed*, 25 Conn. 494, a verdict was rendered in favor of the plaintiff for \$745.85. A motion for a new trial was made by the defendant. Sometime afterward the court granted the motion unless plaintiff would remit \$117. Plaintiff remitted and the court rendered judgment upon the verdict for the balance, including interest from the date of the verdict. The case was taken to the Supreme Court, and the judgment was affirmed. In *Bull v. Ketchum*, 2 Denio, 188, the court recognize the doctrine that at common law the plaintiff was entitled to interest on the verdict where delay of the entry of the judgment was occasioned by the defendant. The same doctrine is held in *Vredenberg v. Hallet & Bowne*, 1 Johnson's Cases, 27; *People v. Gaines*, 1 Johns. R. 343; *Lord v. Mayor of N. Y.*, 3 Hill, 430. In *Rheims v. Robbins*, 20 Iowa, 41, the court held that the interest should have been computed upon the verdict from the time when judgment should have been rendered, thus recognizing the right to interest before judgment. In *Reuther v. The State*, 3 Ind. 86, the court say that judgment upon an award may properly include interest from the date of the award to the

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date of the judgment. In *Buchanan v. Davis*, 28 Penn. St. 211, the award was filed May 17, 1856, judgment was rendered upon it at the December term, 1856, and execution issued for judgment with interest from date of filing the award. The court say, "The award made pursuant to the submission, would, like a verdict, draw interest from the date of filing its entry, and is, therefore, no objection to the *fi. fa.*"

I am aware that a different doctrine was announced by that court in *Felsey v. Murphy*, 30 Penn. St. 340, but Judge STRONG, in delivering the opinion of the court in the subsequent case of *Irvin et al. v. Hazelton*, 37 Penn. St. 465, reviews the decision of the court in *Felsey v. Murphy*, and says that it decides nothing more than that "a judgment entered generally operated from the day of its entry, so as to carry interest only from that time," and holds in the case before the court that there was not error in the court below in entering judgment with interest from the date of the verdict.

In North Carolina, in *Devereux v. Burghwin*, 11 Iredell, 491, it was held that interest was not allowable on an award; and in Louisiana, in *Burner v. Copley*, 15 La. Ann. 504, it was held that in actions for damages, interest could not be allowed either upon verdicts or judgments. But these cases are certainly against the weight of authority; and I think, both upon principle and authority, that whenever judgment upon the verdict has been delayed by the action of the defendant, the plaintiff is entitled to interest from the date of the verdict.

The judgment, however, in this case is wrong in this, that it is for interest from the first day of the term, when it should have been only from the day of the rendition of the verdict. It is true that for many purposes the term is regarded as but one day, and in all actions sounding in con-

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tract, interest, in this court, is computed to the first day of the term only, so that it is entirely proper that the verdicts and the judgments should draw interest from the first day of the term. But in actions of tort, such as the present, where the jury were not directed to compute the amount which they should find in favor of the plaintiff as of the first day of the term, the judgment should have been for the amount of the verdict with interest from the date of its rendition.

The judgment will be modified in accordance with this opinion.

PHILLIPS ET AL. V. THE CITY OF DETROIT.

CIRCUIT COURT—EASTERN DISTRICT OF MICHIGAN—NOVEMBER 6, 1877.

1. INJUNCTION—CORPORATION—NOTICE.—The members of the Board of Public Works of a city are bound by an injunction against the city, of which they have notice, notwithstanding they are not parties to the suit nor the writ, and the same is not actually served upon them.

2. SAME—PATENT CASE.—It is no excuse for the violation of a preliminary injunction in a patent case that the patent is invalid or the writ improvidently granted. If the court has jurisdiction to issue the writ it must be obeyed until it is dissolved.

3. INFRINGEMENT.—A wooden pavement patented is infringed by the use of blocks cut from trees or saplings in their natural form, though a narrow segment is cut off from one side of each block.

4. SAME—PRELIMINARY INJUNCTION.—Where a preliminary injunction in a patent case is violated the respondents will not be required to pay the patentee the amount of his royalty where they were acting in an official capacity, deriving no personal benefit from the infringement, especially if there be any reason to believe they acted in good faith.

5. Practice—Estoppel.

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George H. Lothrop, for complainants.

D. C. Holbrook, city counselor, for defendants.

BROWN, J.—The defense that the members of the Board of Public Works were not parties to this bill, and were not served with the writ, was disposed of adversely to them upon the preliminary argument of this motion. We then held, and such we understand to be the law, that an injunction against a corporation is binding upon all persons acting for or on behalf of the corporation who have notice of the writ and of its contents, whether they be actually served with it or not. In *Wellesley v. The Earl of Mornington*, 11 Beav. 180, 181, an injunction was issued against the defendant, but it did not extend in terms to “his servants and agents.” A motion having been made to commit his agent for a breach of the injunction, it was held irregular; but it was afterward decided that if he had knowledge of the writ he might be committed for the contempt, although not for the breach of the injunction. See, also, *The People v. Sturtevant*, 9 N. Y. 263, 267; *The Bank Commissioners v. The City Bank of Buffalo*, 1 Barb. Ch. Practice, 633; High on Injunctions, Secs. 853, 854, 862, 863; *Safford v. The People*, 5 Central Law Jour. 384.

As respondents in the first allegation of their affidavit admit they had notice of the injunction, I think they are bound to obedience of the writ, and it only remains to determine whether they have been guilty of a violation. The authorities are full and conclusive to the point, and, indeed, it was admitted upon the argument that respondents were not entitled to claim in defense that the patent was invalid or the writ improvidently granted. *People v. Sturtevant*, 9 N. Y. 263; *Sullivan v. Judah*, 4 Paige, 444; *Russell v. Railway Co.*, 1 E. L. & E. 101; High, Sec. 873. The pat-

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ent has been upheld by the decisions of at least two courts before the commencement of this suit, a fact which is, in ordinary cases, sufficient to authorize a preliminary injunction. If, in the meantime, respondents had become satisfied that it was invalid, the proper procedure was to make a showing of this fact and apply for a dissolution. If the court had jurisdiction to issue the writ, it should be obeyed until it is dissolved. I should feel no hesitation, however, in passing upon the validity of this patent, so far as any defenses may exist which were not brought to the attention of the circuit judge upon the original hearing.

Had respondents simply carried out the contracts made by them for paving the streets in question, I should have felt little difficulty in holding them innocent of any violation of this writ. The claim of the complainants' patent is in the following words:

What I do claim as my invention, and desire to secure by letters patent, is—

A wooden pavement composed of blocks of any desired wood, cut from the trunks or branches of trees or saplings, of any desired length, in their natural form, the bark only being removed, placed with their fibres vertical, upon a bed of broken stone and gravel or sand, or either of them, the spaces between the blocks being filled with gravel or sand, the whole made compact by ramming, rolling, or other proper method, as herein shown and described.

In his specification he says distinctly that he does not claim, broadly, the use of wooden blocks in the state in which they are cut from the tree or branches, nor the foundation of stone or gravel, nor the filling of the spaces between the blocks with sand or gravel, separately considered. In other words, he claims a combination, but not the separate elements of the combination.

A party may lawfully use wooden blocks in their natural form, or the foundation or filling of stone or gravel, but he

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cannot use them both without being guilty of an infringement. The specifications of the contracts made by respondents called for the use of "blocks, stripped of bark, of irregular or octagon shape, sawed from cedar timber," a material departure from the wooden blocks cut "in their natural form," as specified in complainant's claim. This was evidently the theory of the city counselor, who, in his affidavit, states that after the service of the injunction he advised the Board of Public Works "that no more pavement which they had been laying, known as the round cedar-block pavement, could be laid while said injunction remained in force; that thereupon it was proposed to split and divide the round cedar blocks, and make them into irregular shapes, and not use the block in its natural form;" and that he advised the board that such use would not be an infringement of the complainants' patent; and the printed forms of contract which had been previously used, and which provided for blocks of a "round cylindrical shape," were changed so as to require the use of blocks of irregular and octagon shape.

The difficulty is, that while his advice was followed in making the contracts, it was disregarded in laying the pavements. The actual block laid was cut from the trunks and branches of trees or saplings in its natural form, precisely as is claimed in complainant's patent, except that a segment of from half an inch to one and a half inches in thickness was split from one side of each block. I regard this as plainly a subterfuge. The slicing off of this strip did not materially change the forms of the blocks, and was of no possible utility in laying the pavement. It was, perhaps, intended to be a compliance with the advice of the city counselor that the blocks must be split and used in an irregular shape in order to avoid the patent. But nothing is better settled in the law of patents than that identity is not affected by colorable differences, that regard is had to substance and not form, the

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inquiry being whether the infringing machine is the same in principle as that patented. Curtis on Patents, 309; *Seymour v. Osborne*, 11 Wall. 516.

I do not think the affidavit of the respondents exonerates them from a participation in this infringement. They swear that the inspectors were instructed by them that the blocks must not be used nor laid in their natural form; that such blocks must be split and their form made irregular, and that no round block in its natural form must be accepted, and that the patent of complainants must not be infringed; that whenever they discovered blocks in their natural form being used they ordered them taken up; and that if any pavement was laid in violation of the injunction, it was so laid contrary to their directions.

It is, however, the duty of the Board of Public Works to supervise the grading and paving of all streets. Session Laws of 1873, vol. 3, 178, sec. 8. In their affidavit they admit they reported to the Common Council that the contracts had been performed and the work accepted, but claim they did so upon the report of the inspectors having charge of the work that the same was done according to the several contracts therefor, and that if the contractors laid the pavement in such manner as to violate the injunction, it was done without their knowledge, and that the acceptance of such pavement was not a violation on their part of the injunction, when the same was laid without their knowledge and consent. But their affidavit is not inconsistent with a knowledge upon their part that the only alteration of the wooden blocks consisted in splitting off the strip, as above specified. This was a nominal compliance with their instruction not to use the block in its natural form, but to split it, and possibly they may have considered that this was sufficient to avoid the patent; but if they accepted anything less than the literal performance of the contract, requiring the blocks to be cut

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in an irregular or octagon shape, they did so at the peril of violating this injunction.

In view of their duties, in connection with the paving of the public streets, to supervise the work and to report the completion of the contract to the council, and also in view of the fact that in the performance of these duties they could scarcely have been ignorant of the manner in which these pavements were being laid, I must hold them chargeable with knowledge of and participation in the violation of this injunction committed, in the use of this evasive block. To render them liable it is not necessary they should have actually committed the breach in person; but if they were present, aiding and abetting the commission of the act, prompted it to be done by other persons, or, having charge of a public work like this, permitted their contractors to depart from the letter of the contract, and accepted the report of the inspectors with approval of work so done, they are liable for an infringement and guilty of disobedience to the writ. High on Injunctions, sec. 861; *Blood v. Martin*, 21 Geo. 127; *Stimpson v. Martin*, 41 Vt. 238; *St. John v. Carter*, 4 Myl. & Cr. 497. Even if the city counselor had advised the use of this particular block, (which he does not seem to have done,) or respondents had acted conscientiously and in good faith, it would be no justification, though the court might consider these facts in fixing the penalty. High, secs. 849 and 851.

I do not regard the fact that the complainants, Farwell & Robinson, may have been interested in paving certain streets, as estopping them from setting up a violation of the injunction by respondents in paving other streets. They would undoubtedly have a right to take a contract directly for the paving of Woodward Avenue, for instance, without thereby assenting that other parties should pave Jefferson Avenue with their pavement. Indeed, the very object of this, as of

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all other patents, is to enable the patentee to maintain a monopoly of laying his pavement during the life of the patent. The estoppel would extend no farther than to prevent them claiming an infringement in respect to the particular streets which they were interested in paving. They make no claim for either of these streets.

Complainants' counsel insists with great earnestness that, instead of imposing a fine upon respondents for a violation of this injunction, the court should require them to pay to complainants a sum sufficient to indemnify them for the actual loss or injury that has been produced by the infringement, viz.: their usual royalty of sixteen cents per square yard. Without determining whether the court has power to make this order in the absence of a statute to that effect, (although the authorities would seem to sustain complainants' view upon this point,) it is clearly a matter of discretion. I think the penalty should not be imposed in this case, for the following reasons:

1. While the violation of the injunction was willful in the eye of the law—*i. e.*, intentional—it was not willful in any odious acceptance of the term. The respondents were acting in an official capacity in the discharge of a public duty, and derived no personal benefit whatever from the infringement. They may possibly have believed that they were following the advice of the city counselor, and were not, in fact, violating the injunction.

2. The complainants will derive no benefit from the immediate payment of the royalty. The city is amply responsible for any decree they may finally recover, and interest will follow upon the ascertainment of the amount.

3. If this order were made respondents would be obliged to pay sixteen cents per yard royalty upon eighteen thousand three hundred and twenty-nine yards of pavement already laid, and fifteen thousand one hundred and eighty-one yards

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contracted for but not laid, making thirty-three thousand five hundred and ten yards, at sixteen cents, \$5,361.60. This sum would have to be paid by the respondents personally, with no definite assurance that they would be reimbursed by the city. It seems entirely clear that complainants should not call upon this court to order the payment of this large amount.

4. The patent may in the end be held invalid, in which case the complainants will have received a large amount of money to which they were not justly entitled, and the city be driven to long and doubtful litigation to recover it back. I find no patent case where this course has been pursued for violation of a preliminary injunction.

Respondents, however, being guilty of a violation of this injunction, will be required to pay a fine of fifty dollars each, together with the costs of this motion, and a counsel fee of fifty dollars, and to stand committed till the terms of this order are complied with.

Subsequent to this decision (see Official Gazette Pat. Office, January 27, 1880,) Judge BROWN ruled that the patent issued to Robert C. Phillips, No. 121,544, was void for want of novelty and invention. Judge EMMONS had sustained the validity of this patent in a suit brought by complainants against the city of Cincinnati. There were produced before the first named judge, as he states, three most important exhibits, which claimed to be in anticipation of complainant's patent, and that were not before Judge EMMONS. [*Reporter.*]

Porter v. *Ætna Ins. Co.*

BENJAMIN PORTER v. *ÆTNA* INSURANCE
COMPANY.

CIRCUIT COURT—WESTERN DISTRICT OF MICHIGAN—
NOVEMBER 7, 1877.

Insurance was in the name of P., describing the property as "his." Policy provided that "if the interest or property insured be leasehold, or that of mortgage, or any other interest not absolute," it must be made known and expressed in the policy. The property was purchased under a mechanic's lien sale by V., who placed it in the name of P, and procured the insurance as the agent of P. V. subsequently procured another title through a sheriff's deed under an execution sale. The mechanic's lien proceedings were void through want of jurisdiction. The court decided that P. had neither a legal nor equitable ownership to the extent represented in the policy and could not recover.

Insurance was effected in July, September and October, 1874, on the Vaughn house at East Rapids, Michigan. The policy was taken in the name of Benjamin Porter, the property being described as "his three-story brick hotel," etc. This hotel was built by an incorporated company, Morgan Vaughn being president thereof. In May, 1874, the hotel was, under mechanic's lien proceedings, sold. Vaughn bought this title and placed it in Porter's name. Vaughn afterwards acquired a title under an execution sale of the property. As president of the company he confessed the cause of action. Was agent of four insurance companies, and placed, as agent, some of the insurance himself, though he was not agent of the defendant. Fire occurred in the building in October, 1874. It was not occupied as a hotel at the time.

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I. M. Crane, of Eaton Rapids, *M. V. Montgomery*, of Lansing, and *Hughes, O'Brien & Smiley*, of Grand Rapids, for plaintiff.

Messrs. Norris & Uhl, of Grand Rapids, for defendant.

WITHEY, J.—Some questions have been discussed which I shall not now dispose of, or review the positions taken by counsel in reference to them.

There are two questions beyond the one disposed of yesterday, which I deem material, to which I shall allude.

The policy, in paragraph number six, under "Conditions of Insurance," uses this language: "If the interest of property insured be leasehold, or that of mortgage, or any other interest not absolute, such must be made known to this company, and expressed in the policy."

The risk is written, "on his three-story brick hotel building."

Now I understand the conceded facts are, that at time of writing the insurance the insured did not make known that his interest was other than absolute. If, then, his interest was not an absolute one in the property, the plaintiff cannot recover.

We have had discussion this morning upon this topic: What was the interest and title of the plaintiff Porter? Under the view which we took yesterday, that the mechanic's lien proceeding was absolutely void, because the court obtained no jurisdiction, and, as Porter claimed, under nothing but that lien proceeding, he had a mere possession at best. It may be questionable whether it can properly be said that he had even possession, in view of the testimony of Mr. Vaughn, and Vaughn's previous relations to the property.

Vaughn, as president of the company that built the hotel, had been managing the property for it, and while thus act-

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ing, of his own motion he makes what he calls a purchase under the lien proceeding in the name of Porter, constituting himself the agent of Porter for the purchase, advancing the purchase money, and then making himself the agent of Porter to take possession of the property.

But assuming that Porter had a mere naked possession, and that that was his title and interest, the question occurs whether it was an absolute interest. This naked possession is the lowest degree of title, and arises where one disseizes another. In this instance it would seem to be the view to take, that it was a disseizin by intrusion.

If Porter obtained no right under the lien proceeding, then his possession was a usurpation and intrusion—an exercise of the powers and privileges of ownership against the rightful owner, whoever that might be, or the rightful possessor. There can be, however, no disseizin without entry and an actual dispossession of the rightful party. But, as we say, assuming that Porter had a mere possession, so far as possession is an interest insurable, it was an absolute interest, because it was not conditional or dependent upon condition.

An absolute estate is one that is free from all manner of condition or incumbrance. Now we suppose a party in actual possession, and having no other title than mere naked possession, may be said, so far as his right goes, to have an absolute interest.

The terms of the policy, as we have said, are, “if the interest or property insured be not absolute.”

We should, therefore, be disposed to say, that whatever interest or whatever property he had, was not conditional but absolute. We do not mean that he had an absolute property in the building, for that implies the exclusive right and possession.

But when we turn to the other question, whether there

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was an insurable interest, we find it is a principle in insurance that the underwriter is entitled to know in whom the interest insured is; for he is entitled to know how far the person insured is interested in guarding the property from loss.

If in law and in fact Porter had no interest other than mere naked possession, and the real interest was in another, had he the interest in the property that was insured?

The interest insured was the hotel property. It was not a special or partial interest. There is a distinction between having an interest and having the property.

A man may have an interest because he may have a mere right less than the entire property. But if he has the property, he has the entire property interest and not a partial interest in the property; he has ownership. A lien would give an interest, but it would not necessarily carry the right to the property, as would ownership.

The interest insured, then, was the property, and was it Porter's property? Was the hotel owned by him?

Not unless naked possession with property in another makes ownership.

The company insured "his three-story brick hotel building," in the language of the policy. Was it his hotel building when his greatest interest was a mere possession, without right of possession, and without right of property?

The company was not informed that Porter was not the owner of the property. So far as the case at present appears, they were not informed that his interest was not the entire property; they were not informed in whom the interest insured was. What did the company insure? They insured the hotel property.

Now, if the company were not informed in whom the interest insured was, and if it was not in Porter, can the policy be sustained, or this suit be sustained upon the policy by

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Porter? If the company insured to Porter the entire interest in this hotel property, it insured to him an interest which he did not own in the present condition of the case.

The nature of Porter's interest should have been communicated to the company; if it was not, the contract of indemnity should not be held valid. And while it may be true that naked possession, so far as it gives an interest, is an absolute interest, still we are of opinion that Porter did not own the property or interest which was insured, according to the testimony of this case. He had, at best, a nominal interest.

If a party who has a mere possession is answerable over to the party who is entitled to the rightful possession of the property, in case the building upon the property should be destroyed by fire, then it might be said that the party who has the mere possession has an insurable interest to the extent of the value of the property; but such is not the law.

Porter, if he was a mere trespasser or disseizor of that property, and it should burn while it was in his possession, unless it was by his fault or negligence or by some act of his, would not be responsible for the value of the building, and therefore could not be said to have an insurable interest to the extent of the value of the property.

His insurable interest, then, was merely the nominal possessory interest, which was liable to be defeated at any moment.

The insurance is but a contract of indemnity; the indemnity can go no further than the interest of the party who is indemnified, and if that interest is partial and not entire, the indemnity does not cover a value incident to ownership.

We think as the case stands there was neither legal nor equitable ownership in Porter of this hotel property, to the extent which he was represented to have, or to the extent which is insured, to-wit: "His three-story brick hotel build-

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ing." He was not the owner of the entire property, or of any part or interest in it, save a mere naked possession, and that was not such an interest as was insured.

If there is no different phase to this case to be shown by further evidence, we hold that the plaintiff cannot recover.

HORATIO W. SANFORD vs. THE TOWN OF PORTSMOUTH.

CIRCUIT COURT—EASTERN DISTRICT OF MICHIGAN—NOVEMBER 26, 1877

FEDERAL AND STATE PRACTICE.

1. Section 914, R. S., which adopts the practice, pleadings, forms and modes of procedure of the State courts, applies only to such as are established by the statutes of the several States, and not to modes of procedure established by judicial construction of common law remedies.

2. The Federal courts are not bound by the decision of the Supreme Court of a State, which decides that mandamus is the only proper remedy upon municipal bonds.

3. *Quære*, whether this section extends to the practice prescribed by rules of the State courts of general application.

On demurrer to a plea to the jurisdiction.

Action of assumpsit upon certain interest warrants or coupons annexed to bonds issued by the town of Portsmouth to aid in the construction of a plank road. Defendant pleaded to the jurisdiction upon the ground that assumpsit would not lie, insisting that mandamus was the only proper remedy. Plaintiff demurred.

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Atkinson, for plaintiff.

Freeman, for defendant.

BROWN, J.—As the point was not raised by counsel it is not necessary here to decide, whether a plea to the jurisdiction is a proper mode of taking advantage of a defect apparent upon the face of the declaration, where the form of the remedy only is in question. That assumpsit is a proper action upon securities of this kind is settled, at least so far as the Federal courts are concerned, in *The Town of Queensbury v. Culver*, 19 Wall. 83, 92; see, also, *Heine v. Levee Commissioners*, *ibid.* 655, 657. While the question has not been directly decided elsewhere, there is a multitude of cases in the recent volumes of the Supreme Court reports, where assumpsit or debt has been brought upon municipal obligations of this description, in which the court has impliedly recognized these actions as the proper remedy.

It is equally well settled that a writ of mandamus will not lie in such cases in the Federal courts until after judgment has been obtained. The Circuit Courts have no power to issue a writ of mandamus by way of original proceeding, where such writ is neither necessary nor ancillary to the jurisdiction already acquired. *Bath County v. Amy*, 13 Wall. 244. Further discussion of these propositions is concluded by the opinions above cited.

It is insisted, however, that under the practice of this State, as established by the Supreme Court, assumpsit will not lie, and that under the act of 1872 adopting "the practice, pleadings, forms and modes of proceeding" of the State Courts, this construction is obligatory upon this court. The Supreme Court of this State seem to have adopted the view that mandamus is the only proper remedy where the liability of the corporation is fixed or the amount of the debt liquidated

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and adjusted. This question was first directly passed upon in *Marathon v. Oregon*, 8 Mich. 372, in which, after a division of a township, the town boards met and determined the amount of indebtedness to be paid by the new township. It was held by a majority of the court that the amount being a fixed and liquidated demand against the new township, which it was the duty of its town board to allow, mandamus was a proper remedy in an action against the township to recover the amount of the demand. The decision was put partly, at least, upon the ground that by law no execution can be issued against a township, and that as a judgment would be useless, the amount of the debt being already ascertained, a town ought not to be put to the useless expense of a judgment by default of its officers, and the creditor ought not to be put to delay or a double pursuit. There was a strong dissenting opinion in this case by Mr. Justice CHRISTIANCY. In *The Township of Dayton v. Rounds*, 27 Mich. 82, the same principle was extended to bonds authorizing the payment of bounties to volunteers, and it was stated to be the settled practice of the State that a remedy by action was improper in such a case. It was again affirmed in the case of *McArthur v. The Township of Duncan*, 34 Mich. 27, in which mandamus was held to be the only proper remedy to enforce the payment of orders regularly drawn by the highway commissioners on the township treasurer, the duty of the township authorities to raise the necessary funds and to make payment, being just as necessary upon the presentation of such orders as it would be after judgment.

Assuming that the Supreme Court would adhere to this principle if the question arose upon coupons of this character, it only remains to consider whether such construction falls within the scope of the act of 1872 as a "practice or mode of proceeding," existing in the courts of record of this State,

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within the meaning of this act. I am clearly of the opinion it does not, for the following reasons:

1. I think the practice, pleadings, and forms and modes of proceeding in civil causes, mentioned in sec. 914, are confined to those established by the *statutes* of the State, and do not include modes of procedure established by *judicial construction of common law remedies*. Whenever general principles of law are involved, the Federal Courts may exercise an independent judgment. By the judiciary act of 1789, Revised Statutes, sec. 721, "the laws of the several States * * * shall be regarded as rules of decision in trials at common law in the courts of the United States;" but it has never been held in construing this section that the judicial decisions of the several States upon questions of general law were obligatory upon the Federal Courts.

We are bound by the constitutions and laws of the several States, and by the construction given to such constitutions and laws by the courts of the State. It has also been held that we are bound by decisions of the State Courts so far as they establish rules of law affecting the title to lands, or principles which have become a settled rule of property, but no farther. *Swift v. Tyson*, 16 Pet. 1; *Boyce v. Tabb*, 18 Wall. 546; *Delmas v. Insurance Co.*, 14 Wall. 661; *Lane v. Vick*, 3 How. 464. We had occasion to apply this construction at the last term of this court, where the question arose as to the liability of a city for injuries received from a defective sidewalk. We then held the municipality liable, following the decisions of the Supreme Court, although the Supreme Court of the State had held that such liability did not exist.

The Supreme Court of the United States also held, in numerous early cases, that sec. 721, above quoted, did not extend to the procedure or practice of the Federal Courts. *Robinson v. Campbell*, 3 Wheat. 212; *Wayman v. Southard*,

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10 Wheat. 1. It was to remedy what was considered a defect in this particular, that the act of 1872 was passed; and I think the same construction should be given to it.

The opinion of the Supreme Court of the State that mandamus is the only proper remedy, being simply the enunciation of a general principle of law, running counter to the decisions of the Supreme Court of the United States upon the same subject, is not binding upon this court. Whether the act of 1872 may not also extend to the rules established by the Supreme Court of the State, of general application to the common law courts of the State, we are not called upon to decide. It would seem, however, that sec. 914 adopting the State practice, and sec. 918, authorizing the Circuit Courts to regulate their own practice, being contemporaneous acts, should be construed together. This would confine sec. 914 to the practice established by State statutes, leaving the Federal Courts still at liberty to adopt any rules not inconsistent therewith.

2. We are required by the act of 1872 above quoted, R. S., sec. 914, to conform our practice, pleadings and forms and modes of proceeding only "as near as may be" to those of the State Courts, or as the Supreme Court has expressed it, as near as may be "practicable." This leaves the act, to a certain extent, mandatory or directory, and vests in this court a limited discretion to reject methods of procedure which are inconsistent with the established and well recognized usages of the Federal Courts. As observed by the Supreme Court in *The Indianapolis R. R. Co. v. Horst*, 93 U. S. 301: "This indefiniteness may have been suggested by a purpose. It devolved upon the judges to be affected, the duty of construing and deciding, and gave them the power to reject, as Congress undoubtedly expected they would do, any subordinate provision in such State statutes which in their judgment would unwisely incumber the administration of the law, or

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tend to defeat the ends of justice in their tribunals." This discretion has actually been exercised in a number of cases. In *Nudd v. Burrows*, 91 U. S. 426, it was held that the practice act of Illinois, which provided that the court should instruct the jury only as to the law, and that they should on their retirement, take the written instructions of the court and return them with their verdict, was not binding upon the Federal Courts sitting in that State. It was said that the personal conduct and administration of the judge, in the discharge of his particular functions, was neither practice, pleading, nor a form or mode of proceeding within the meaning of the section. So in *The Indianapolis R. R. Co. v. Horst*, 93 U. S. 291, the court refused a motion to instruct the jury to find specially upon particular questions of fact involved in the issues, in the event they should find a general verdict, and the court held that such instruction was right, notwithstanding a statute of the State requiring the court to submit particular questions to the jury, when requested so to do. So in *Beardsley v. Little*, 4 Cent. Law Jour. 270, Judge BLATCHFORD held that the provision of the New York code of procedure, for the examination of witnesses before trial, did not apply to the Federal Courts.

It is scarcely necessary to say that a construction which would oust this court of a jurisdiction over a very large class of cases, is not a "practicable conformance" with the mode of procedure in the State courts, within the meaning given to this section by the Supreme Court.

The plea to the jurisdiction is therefore overruled.

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JAMES A. BLAIR v. THE FIRST NATIONAL BANK
OF MANSFIELD.

CIRCUIT COURT—NORTHERN DISTRICT OF OHIO—
DECEMBER 1, 1877.

AUTHORITY OF CASHIER—INDORSEMENT OF PAPER BY HIM—
OFFICERS MAY BORROW MONEY OF THE BANK.

1. NOTE PAYABLE TO CASHIER.—A note payable to M., cashier, is a note payable to the bank.

2. M., as cashier, has authority to assign notes.

3. PRESUMPTION AS TO OWNERSHIP.—When the note is payable to M., cashier, the presumption is that it is the property of the bank; and if indorsed by the cashier to another bank for discount, it would be in effect asking the bank to discount it for the bank of which M. was cashier; and if discounted and the proceeds were received by the cashier it would be deemed the transaction of the bank, and within the scope of the cashier's duties and for which the bank would be liable. Nor does it matter what the defendant did with the money.

4. The president, cashier or director of a National Bank may borrow money of the bank as other persons.

5. PAPER NOT AUTHORIZED BY COMMITTEE.—Whether paper has or has not been authorized by the discounting committee of the bank does not in anywise affect parties who are *bona fide* indorsees before maturity.

6. INDORSEMENT OF ACCOMMODATION PAPER.—A cashier has no authority to indorse accommodation paper so as to bind his bank, not passing through it in its usual line of business. The indorsement to bind the bank must be within the scope of his duties as cashier.

The court states the facts.

Slade & Kline and *L. R. Critchfield*, for plaintiff.

M. R. Dickey and *H. C. Hedges*, for defendant.

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WELKER, J.—This suit is brought against the bank upon the following promissory note:

\$5,000.

MANSFIELD, OHIO, August 11, 1873.

Ninety days after date I promise to pay to the order of R. H. McMann, cashier, five thousand dollars, at the First National Bank of Mansfield, in New York Exchange. Value received.

WILLARD HICKOX.

Indorsed. 1st. Pay D. P. Dildine, Esq., cash or order.—R. H. McMann, Cashier.

2d. Pay J. A. Blair, or order.—D. P. Dildine.

The petition alleged the assignment by R. H. McMann, cashier of the bank, for and on behalf of the bank, to D. P. Dildine, before due, and for a valuable consideration, and by said Dildine, before maturity and for a valuable consideration, to the plaintiff, and avers the proper demand and notice on maturity to the First National Bank, etc.

The defendant answers, as a defense, that the note was received by the said R. H. McMann without any consideration therefor, and endorsed to Dildine, cashier, without any consideration to said National Bank, and solely as a matter of accommodation for said Hickox. That Hickox was largely indebted to the bank at the time of the execution of said note, and that he and said McMann unlawfully and fraudulently colluded and combined to cheat the bank, and with said purpose and intent Hickox executed the note to McMann, and with said purpose and intent, and without any authority in law or fact therefor, McMann unlawfully and fraudulently endorsed and delivered said note to Dildine without receiving any consideration therefor for said bank.

To this answer the plaintiff files a general demurrer. The answer does not deny the assignment and transfer of the note by McMann, cashier to Dildine, and by Dildine to the plaintiff, before maturity.

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We may, therefore, in considering the plaintiff's demurrer, and the sufficiency of defendant's answer, regard the assignment to have been made before maturity and for valuable consideration paid by the plaintiff.

That being so regarded, all that part of the answer as to the consideration of the note, or its assignment to the plaintiff, constitutes no defense to the note in the hands of the plaintiff, if he be an innocent holder of the note.

The answer and demurrer raise two questions for determination: 1st. Whether the note payable to McMann, cashier, is a note payable to the bank? 2d. Whether McMann, as such cashier, had authority to assign the note? As to the first point: The case of *Bank of Genessee*, 19 N. Y. 313, was a suit on a note payable to "the order of S. B. Stokes, Cash.," at the Bank of New York, and by him endorsed by the name of "S. B. Stokes, Cash." It was held by the court that the note was payable to the bank. Judge DENIO in that case says: "In the absence of any evidence to connect the bill with defendant's bank, he would be regarded as the payee and indorser individually, and the abbreviation affixed to his name would be considered as *descriptio personæ*. But when it has been shown that he was the defendant's cashier, the presumption would be that the note payable in that form, was the property of the bank, and when he endorsed it with the addition mentioned, and sent it to the plaintiff in an official letter, for discount, it was the same thing as requesting the plaintiff to discount on behalf of the defendant's bank."

It was also held in that case, "that there being nothing in the circumstances to put the endorser upon inquiry, and he having discounted the bill in good faith, he was entitled to recover against the bank, although the bill was endorsed for the accommodation of a third party: the bank having no

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interest in it, but its governing officer authorized the endorsement and application for discount."

In 1 Wallace, 234, it is held by the court: "That where negotiable paper is drawn to a person by name with addition of 'cashier' to his name, but with no designation of the particular bank of which he was cashier, parol evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation."

These cases, I think, settle that the National Bank was the owner of this note, although payable to McMann, as cashier; and that it was the paper of the bank.

2d. Had he authority to transfer and endorse the note?

In Morse on Banks and Banking, 151, it is said, in speaking of the powers of a cashier, that "all its negotiable paper he may negotiate and transfer in its behalf, and to this end he may endorse it over, so as to bind the bank like any ordinary endorser on similar paper." Again: "The outside party dealing with him (cashier) in good faith, and without notice of the irregularity, holds the bank as if the transaction had been unobjectionable throughout. For it is the inherent power of the cashier, which he exercises simply by virtue of his office, to make the transfer, and no person can be required, in a case where no circumstances of suspicion put him upon inquiry, to go behind this authority. If the agent exceeds it, the matter lies wholly between himself and principal." See, also, 29 N. Y. 554.

Again: "That the cashier, by his endorsement of negotiable paper on behalf of the bank, will always bind the bank to the full extent that any individual endorser of like paper and in like form, would be bound, unless the holder of the endorsed paper took it with actual notice of some fact rendering the endorsement irregular and invalid."

It will be seen by the authorities that the powers of a

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cashier are very large. He is the general agent of the bank for all its banking transactions. Whether he have specific authority to do certain things or not, if within the scope of his general duties, the outside world have a right to presume the authority, and his acts bind the bank.

In this case the note was payable to the cashier of the bank, and by him endorsed in the regular course of business, we have a right to presume, to Dildine, cashier of another bank, and by him to the plaintiff. What circumstances of suspicion were there about the transaction to put the plaintiff on his guard that appear in the answer? It is a common practice among banks to receive negotiable paper, and forward, after endorsement by the cashier to another bank, and there re-discount the same.

There is no allegation in the answer that any of the matter therein set up was brought to the knowledge of the plaintiff, or that there were such circumstances surrounding the transactions therein set forth to put the plaintiff upon inquiry in purchasing the note.

The admitted relation of McMann to the bank was such that any person had a right to suppose the transaction was in the usual course of business.

In the absence of these facts in the answer, I do not think it a good defense, and the demurrer thereto will be sustained.

The case was then tried by a jury.

WELKER, J., in his charge to the jury, made the following legal points:

1. The note being payable to "R. H. McMann, Cash.," is a note payable to the bank of which he was cashier.

2. If the evidence shows that McMann was the cashier of the bank (defendant), the presumption is, that the note payable in that form was the property of the bank, and if the cashier endorsed it as such, and sent it to the Savings Bank in an official letter for discount, it would be the same thing

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as requesting the Savings Bank to discount it on behalf of the defendant (bank).

3. If the note of Hickox was the note of the bank and so received by the cashier, and afterwards for the purpose of re-discounting, was endorsed by McMann as such cashier, and discounted by the Savings Bank, and the proceeds sent to the defendant, that was a transaction within the scope of the duties of the cashier, and for which the bank is liable, and it does not make any difference as to the right of the plaintiff, what the defendant did with the money thus received.

4. The president, cashier or director of a National Bank may borrow money from the bank, as any other person may, and execute a valid note for the same, that will bind them as well as the bank receiving it; and such note is not void, nor, in the absence of fraud, can such note be repudiated or avoided by the bank by reason of that relation.

5. If the plaintiff purchased the note before maturity and for a valuable consideration and in good faith, the defendant cannot set up any defense to the same growing out of the consideration of the note, or for want of authority to make the note or the endorsement, unless he took it with actual notice of some fact rendering the endorsement irregular and invalid; or unless there was something in the circumstances of the transaction throwing suspicion upon it to put the plaintiff upon inquiry as to the character of the transaction.

6. If the endorsement of this paper by the cashier, and its being sent to the Savings Bank for discount was in the ordinary and usual line of banking business, then, that fact was not such a circumstance as would put the plaintiff upon inquiry, for he had a right to suppose it was legitimate and proper.

7. If the note was payable to some person not connected with the bank, but assigned to the bank and endorsed by the cashier, and presented by an outsider, to the Savings Bank

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for discount, that fact would be a circumstance to put the endorser upon inquiry as to the transaction, and the authority of the cashier to make such endorsement to bind the bank.

8. An outside party dealing with the cashier of a bank, in good faith and without notice of the irregularity, holds the bank as if the transaction had been unobjectionable throughout. For it is the inherent power of the cashier, which he exercises simply by virtue of his office to make the transfer, and no person can be required, in a case where no circumstances of suspicion put him upon the inquiry, to go behind this authority.

If nothing appears upon the face of the paper, or in the circumstances connected with the assignment to throw suspicion upon it, the purchaser, before maturity, is not bound or required to make inquiry.

9. The fact whether paper has been authorized by a discounting committee to be discounted by a bank, or not so authorized, does not in any way affect an outside party who is a *bona fide* endorsee of the paper before maturity. Such action or want of action by the committee, does not in any way affect the validity of the paper when put into circulation.

10. Such committee being only part of the private machinery of the bank, devised for its own safety and advantage, the outside public is not in any way affected by its action in relation to commercial paper.

11. Accommodation paper in a legal sense means paper made without consideration therefor.

12. A cashier of a bank has no authority to endorse accommodation paper, not passing through his bank in its line of usual business, so as to bind his bank to the endorsee therefor. The endorsement to be binding upon the bank must be within the scope of his duties as such cashier.

13. If such circumstances of suspicion have been shown

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to exist as ought to have put the officers of the Savings Bank and the plaintiff upon inquiry before purchasing, they would be presumed to have either made the inquiry and ascertained the truth, or to have been guilty of a degree of negligence equally fatal to their claim to be considered *bona fide* purchasers.

14. That the fact that the plaintiff knew that Hickox, the maker of the note, was the president of the First National Bank (deft.) was not such a circumstance as would constitute notice to the plaintiff to destroy his character of innocent holder of the note, or put him upon the inquiry as to the character of the note.

15. The law presumes a consideration in every promissory note, because it is an obligation to pay money. Verdict for the plaintiff. Motion for new trial. 1. Because of error of the court in the law. 2. That the verdict was contrary to the law and the evidence.

Motion for new trial. Heard by Judges EMMONS and WELKER.

EMMONS, J.—The action is upon an endorsement by the defendant's bank, as organized under the National Banking law. The note was regularly endorsed in due course of trade, by the cashier of the defendant, for full consideration paid by the Tiffin Savings Bank. The latter bank transferred it for full consideration to the plaintiff before maturity. The defendant now moves for a new trial upon the ground that as it appeared the maker of the note was insolvent, was president of the bank, and, by connivance with the cashier, fraudulently obtained the discount of the note by the defendant, and that, in view of this fact, the court should have charged the jury, that inasmuch as the note was made by a person who was also president of the bank, that the discount *per se* was unlawful, and that the note on its face put the plaintiff

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upon inquiry, and authorized the defendant to prove, as against him, the want of consideration.

It is somewhat difficult to deal with such a proposition. If there is any possible defense in a case like this, it is only upon the broad ground that the president of a bank is incompetent in all cases to become a borrower from his bank, and that his paper is in all instances unlawful.

This is not a case of failure of consideration. The contract given in evidence is one for which the defendant received full consideration. The Savings Bank and its transferee, the plaintiff, have nothing to do with solvency or insolvency of the maker of the note. They dealt with the bank which endorsed it.

If there is any defense, it must be on the ground of illegality, that the transaction is *ultra vires*, or so at war with public policy as to become void at common law. If such grounds can be maintained, then, of course, all parties to an unlawful transaction can set that up as a defense.

No case has been referred to showing that a bank officer or director cannot borrow as freely as other persons, so as the loans are honest, and the borrowers do not themselves participate in authorizing the loan. On page 99 of *Morse on Banking*, after discussing the general doctrine, that so far as the bank itself is concerned (but not as to third persons), that it is unlawful for a director to vote upon a matter in which he is personally interested, it is added that: "In the absence of legislative prohibition there is no rule of the common law which prevents the making of a loan or discount to a director any more than to any other person." Cites *Conyngham's Appeal*, 57 Penn. St. 474.

The distinction is plain in principle, as it has always been recognized in actual administration between being interested in a valuable contract and in borrowing money at a lawful rate of interest.

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It has never been deemed a breach of trust for an officer of a corporation to borrow its money. Angel & Ames, 296, 297, Secs. 299, 300.

Cashier may transfer the securities of the bank in the usual course of business. It being entirely clear that a bank director or officer may, in the ordinary course of business, borrow money of the corporation, it would have been error for the judge to have charged the jury that the mere form of paper showing he had done so, was notice to the plaintiff of any fraud upon the bank. It is unnecessary to say that irregularities in the conduct of the internal affairs of a corporation do not bind third parties who had no notice, for here it does not appear that any irregularity had occurred. At most, it is a fraudulent discount of paper to an insolvent party. In such a case the defendant concedes that a third party taking the paper from the bank itself, paying full consideration, may recover on its endorsement.

The motion for new trial is overruled, and judgment on the verdict.

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GIBSON v. CINCINNATI ENQUIRER.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—DECEMBER,
1877.NEWSPAPER ARTICLE—LIBEL—ADMISSIBILITY IN EVIDENCE OF
OTHER ARTICLES.

1. Libellous publications from the same paper and relating to other parties, may be put in evidence, in an action for libel, in order to prove that the paper showed a want of care in guarding its columns against the insertion of such articles. If such or similar articles were frequent it would be a ground for increasing the damages, as it would show a recklessness of conduct.
2. The words *crim. con.* and *flagrante delicto* defined.
3. A verdict for \$3,875 against a newspaper, having a large circulation, for libel in charging plaintiff with adultery, is not excessive.

This was action for publishing in the Cincinnati *Enquirer*, a paper of large circulation and influence, the following libel:

STILL ANOTHER.—The new city of Huntington, up the river is now enjoying one of the juiciest *crim. con.* scandals of the day. The parties are one Gibson, a Republican editor, and the wife of a railroad official at Huntington, West Virginia, who were caught *in flagrante delicto* on the steamer *Bostonia*, and hustled ashore at midnight by Captain Bryson.

Evidence showed that plaintiff was a person of good reputation, having a wife and children; that he was engaged in publishing a newspaper in Huntington, which had a circulation in several States; that defendant's paper had a daily circulation of 15,000 or thereabout, and 300 within limits of plaintiff's paper.

The defendant gave evidence tending to show that the article was not published maliciously; that it was taken from a printed slip received in an envelope from Hunting

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ton, West Virginia, without any name or address; that he had no knowledge of the plaintiff, and that a correction was published in the *Enquirer*.

The jury returned a verdict for the plaintiff, fixing his damages at \$3,875.

Defendant moved for a new trial upon the several grounds stated in the opinion.

T. D. Lincoln, for plaintiff.

Hoadly, Johnson & Colston, for defendants.

BROWN, J.—The first error assigned is in the admission of the article immediately preceding the libel in question, and in permitting the same to be read to the jury.

I am informed by the learned judge who presided at the trial, that in fact only the caption of the article was read to the jury as explanatory of the words "Still Another;" but it is claimed that even this was erroneous, unless the words "Still Another" were aided or explained by an innuendo, referring to the preceding article, which was entitled, "Terrible Charge against a Methodist Preacher." I think the defendant has mistaken the province of an innuendo. There is here no ambiguity of language of which it is the function of the innuendo to point out the meaning, but a mere reference to something which evidently preceded the libel in question, and to which it was not an error to direct the attention of the jury.

But I am inclined to think the entire article, which was also libellous in its nature, was admissible as bearing upon the question of damages. While it is doubtless true that the commission of one grave offense cannot be proven by evidence of another offense committed at a different time and place, there is a class of cases holding that where the knowl-

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edge or intent of the party is in issue, evidence of other acts of a similar nature, done at or about the same time, is competent evidence of his method of doing business; for instance, in prosecutions for passing counterfeit money, evidence that the prisoner made efforts to pass counterfeit money upon other persons than those set forth in the indictment is always competent as bearing upon the question of *scienter*. Wharton's Criminal Law, section 1457; 1 Phillips on Evidence, 768-9. So also in prosecutions for frauds upon the revenue, evidence that the party has committed other frauds of a similar character is constantly admitted as bearing upon the question of intent. *Allison v. Matthieu*, 3 Johns. 235; *Hennequin v. Naylor*, 24 N. Y. 139; 1 Phillips on Evidence, 750, 753, 758-9. So also in action against a railroad company for damages occasioned by fire from locomotives, evidence that other locomotives belonging to the same road were in the habit of throwing sparks beyond where the fire took place is competent as showing the general character of the equipment used by the road. *Sheldon v. Hudson River Railroad Co.*, 4 Kern., 220; *Pittsburgh, Fort Wayne & Chicago Railroad v. Ruby*, 38 Ind. 311-12; *Aldridge v. Great Western Railroad Co.*, 3 M. & G. 515; *Field v. N. Y. Central Railroad*, 32 N. Y. 339. The same rule has also been applied in actions for libel, and evidence of other articles of a libellous nature, has been held competent as showing a want of care in guarding the columns of the paper against the insertion of such articles. *Pearson v. Lemaitre*, 5 M. & G. 700; *Chubb v. Westley*, 6 C. & P. 436.

In the case of the *Detroit Daily Post Co. v McArthur*, 16 Mich. 454, the court observe: "The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, would reduce the blameworthiness of the publisher

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to a minimum, for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling, beyond what is inevitable from the nature of the libel. * * * If, on the other hand, it should appear, from the frequent recurrence of similar libels, or from other proof tending to show a want of solicitude for the proper conduct of his paper, that the publisher was reckless of consequences, then he would be liable to increased damages, simply because by his own fault he had deserved them. By such recklessness he encouraged fault or carelessness in his agents, and becomes in a manner in complicity with their misconduct." This rule has very recently been affirmed by the same court in the case of *Scrapps v. Reilly*, 4 Cent. L. J. 128. In this case it was also claimed that the court erred in admitting certain publications relating to other parties. It was made a question whether the paper was conducted with sufficient care to save the plaintiff in error from punitive damages, in case the jury should find the article libellous, and no actual malice. "If such mode of proof was proper, these articles tended to show the want of such care." The McArthur case is here cited as plainly imputing the right to show the recurrence of similar libels, and implying distinctly that particular instances may be adduced to make out the fact of general recklessness in the conduct of the paper.

In the charge to the jury in this case the learned judge laid the exemplary damages before them in the following words: "So that before you can go beyond the general damages indicated by the pleadings in the case, and give exemplary damages, you must find either that it was willful, or that there was that active want of care which would raise the presumption of conscious indifference, not gross negligence, but a conscious indifference to the rights of the plaintiff." In this view of the case, it seems to me that

no error should be predicated upon the admission of this article.

Secondly. It is claimed that the court erred in defining to the jury the meaning of the abbreviation "*crim. con.*" There is nothing in this objection. Courts take judicial notice of the meaning of words and idioms in the vernacular of the language, (1 Greenleaf's Evidence, section 5,) and no colloquium or innuendo is necessary to point out their meaning. Where the meaning of the words is well settled by common usage, there is no use of calling persons to testify as to what was meant by them at the time they were uttered, or to explain their meaning if published in a newspaper. The words "*crim. con.*" are usually understood as an abbreviation for "criminal conversation," and these words have of themselves acquired a fixed and universal significance.

Third. Equally unobjectionable was the translation by the court of the words "*flagrante delicto.*" While a libel published in a foreign language would, ordinarily, be interpreted by witnesses skilled in the knowledge of both languages; there is a class of foreign words that have been so far anglicized by common use as to have become, substantially, a part of the language. Instances of these are "habeas corpus," "bona fide," "prima facie," "a fortiori," from Latin, and a large number from the French and other modern languages. Wherever such words occur, it is clearly within the province of the court to define them to the jury. Townsend on Slander and Libel, 160, note 2; *Homer v. Tuunton*, 5 H. & M. 661, 667; *Barnet v. Allen*, 3 H. & N. 376; *Hoare v. Silverlock*, 12 Ad. & El. N. S. 624. It is only where the words are ambiguous, obscure, or used in a local or technical sense that an innuendo is necessary. Indeed, if the whole libel had been published in a foreign language, and the court had assumed to translate and define its meaning to the jury without the aid of experts, it is difficult to see how this error

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could be made the ground for a new trial. It is only error that prejudices which justifies setting aside the verdict; and if the translation is in fact correct, it is difficult to see wherein the prejudicial error lies. Certainly the definition given by the learned judge of the words "*in flagrante delicto*," if any definition were necessary to an ordinarily intelligent jury, was undoubtedly correct. There is no ground here for a new trial.

Fourth. It was insisted with great earnestness, that the court should set aside the verdict upon the ground of excessive damages. Nothing is more difficult than to determine in an action of tort, for injury to person or reputation, what damages are excessive. In actions upon contract they can, ordinarily, be computed with some degree of certainty. Frequently they are the subjects of mere mathematical calculation. In such cases a slight excess might justify the court, if not in setting aside the verdict, at least in making the refusal of a new trial conditioned upon a reduction; but in actions of tort an exact computation is not only impossible, but there is frequently an entire absence of data from which the amount of damages can be approximately estimated, and especially is this so in regard to injuries to person or to reputation. In actions for libel so much depends upon the relative situation of the parties, the character of the language used, and the amount of publicity given to the libel, that it is scarcely too much to say there is no rule beyond the discretion of the jury. I find the law upon this subject thus stated in Townsend on Libel, section 293: "As the amount of damages in an action for slander or libel is always a subject for the exercise of the sound discretion of the jury, who may give more or less, according to their conclusions from the whole case respecting the motives of the publisher, a verdict in such an action will not be set aside for excessive damages, unless there is some suspicion of unfair dealing, or unless the case

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be such as to furnish evidence of prejudice, partiality or corruption on the part of the jury. The case must be very gross and the damages erroneous to justify a new trial on the question of damages." A few instances where applications have been refused, will show the general reluctance of courts to set aside verdicts in actions of this kind upon the ground of excessive damages. In *McDougall v. Sharp*, First City Hall Recorder, the charge was perjury, and the verdict \$3,500, which the court refused to disturb; in *Tillotson v. Cheetham*, 2 Johns. 63, the court refused to set aside a verdict for \$1,400 for accusing the plaintiff of political corruption. "A case must be very gross and the recovery enormous to justify our interposition on a mere question of damages in an action for slander." In *Ryckman v. Parkins*, 9 Wend. 470, a verdict in slander of \$7,000 was sustained; in *Trumbull v. Gibbons*, N. Y. Jud. Reposit., 1, a verdict of \$15,000, and in *Fry v. Bennett*, 4 Duer. 247, one of \$10,000 for publishing charges against the plaintiff as manager of an opera company were also held insufficient to justify the interference of the court. In *Duberley v. Gunning*, 4 T. R. 651, the court refused to disturb a verdict of five thousand pounds in an action for criminal conversation, and in *Coffin v. Coffin*, 4 Mass. 1, the court sustained a verdict of \$2,500 for slander spoken in the House of Representatives. The case was tried in 1808, when the purchasing value of \$2,500 was at least twice what it is to-day. In *Letton v. Young*, 2 Met. 558, the Supreme Court of Kentucky refused to set aside a verdict of \$4,000 in an action of slander.

The cases of this character, in which the courts have granted new trials upon this ground are not only very rare, but will always be found to be accompanied by strongly mitigating circumstances. In *Nettles v. Harrison*, 2 McCord, 230, the defendant said of the plaintiff that he kept a house of prostitution; verdict \$5,000. A new trial was granted, as

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the words were uttered but once, and were induced by plaintiff encouraging defendant's son to visit his house, having daughters of none the best characters, with whom his son had been too intimate. In *Freeman v. Tinsley*, 50 Ill. 497, a verdict of \$2,500 was set aside in an action for slander, where the words were spoken in high excitement, provoked by the plaintiff; and under a plea of justification it was shown the plaintiff had been indicted for the crime with which he was charged, and in connection with proof of doubtful associations and suspicious character. In the case of *Scripps v. Reilly*, above cited, a libel was published in a newspaper having about the circulation of the Enquirer, imputing a charge of adultery to a prominent citizen of Detroit; the jury returned a verdict for \$4,000, and although a new trial was finally obtained, the fact that the damages were excessive was not suggested by the astute counsel who defended the case. Upon the re-trial the verdict was increased to \$5,000. In *Neal v. Lewis*, 2 Bay, 204, the Supreme Court of South Carolina refused to set aside a verdict for \$3,000 for calling the plaintiff a rascal, a villain, a swindler and thief.

While if the language used in the case under consideration had simply been spoken of the plaintiff in the presence of a few persons, or had been published only in a letter or other private communication, the damages might be excessive enough to justify the interposition of the court, a very different rule obtains where the publicity given to the charge is so great. While there was no evidence of express malice, there is certainly testimony tending to show that the steamer *Bostonia*, on which the crime was charged to have taken place, made frequent trips to Cincinnati, and that very slight diligence on the part of the defendant in sending a messenger to the steamer would have shown the falsity of the charge.

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The disagreeable feature of the case was the fact that the plaintiff and defendant were publishers of newspapers of opposite politics, but as the instructions to the jury were characterized by great fairness and temperateness of language, as they were strictly cautioned against political influence, and as the amount of the verdict was entirely consistent with the absence of such influence, I see no reason for taking this into consideration. While juries are very apt to be biased, more or less, by their political or religious opinions, it would be very unsafe for courts to assume that a verdict was dictated by those considerations, without clear proof of the fact. The charge made against the plaintiff was one very likely to injure him severely in his social relations, and to impair his reputation among his neighbors as a good citizen. The publicity given to it in defendant's paper was very great. The amount of the verdict suggests a compromise of conflicting opinions, and I think it quite within the discretionary limits of the jury.

The motion for a new trial must be denied.

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MATTHEW J. MOYNAHAN v. JAMES WILSON.

CIRCUIT COURT—EASTERN DISTRICT OF MICHIGAN—DECEMBER
TERM, 1877

. REPLEVIN—REMOVAL.

The act of filing in a State Court a petition for the removal of a case to the Circuit Court of the United States is no waiver of a fraud in procuring service of process.

Accordingly where property was fraudulently decoyed within the jurisdiction of a State Court and seized upon a writ of replevin, and the defendant at once removed the case to a Federal Court and moved to set aside the service of the writ: *Held*, the motion did not come too late.

On motion to dismiss suit and for the return of property replevied. This was an action of replevin commenced in the Circuit Court for the county of Wayne, on the 7th day of November, 1877, and removed to this court on the 13th. Upon the same day a certified copy of the record was filed in this court, and a motion made to dismiss the suit upon the ground that the property replevied was decoyed within the jurisdiction of the State Court by a fraudulent device or trick of the plaintiff.

L. T. Griffin, for plaintiff.

M. E. Crofoot, for defendant.

BROWN, J.—Most of the statements contained in the affidavits read upon this motion relate to the merits of the controversy, and, therefore, have no bearing here. It appears that the plaintiff and one Demass, when in Indianapolis,

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made a bargain with one Gosnell, the then owner of the mare, to bring her here with the intention of matching her against a horse known as "Tom Hendricks" and that five hundred dollars were deposited in Gosnell's hands, either as security for the safe return of the mare, or as a personal loan from the plaintiff. Gosnell claims that the agreement was to be cancelled if, in the mean time, he could sell the mare, and that he did sell her to Wilson with the consent of all parties, the money being returned to Demass. On the other hand, it is claimed by the plaintiff that he was to have the use of her for a year, to race her as he liked, and to divide the profits with Gosnell; that he knew nothing of the sale to Wilson, and that Demass received back the \$500 after plaintiff had left Indianapolis, and without authority from him. All this is immaterial to the present controversy; so likewise are the affidavits with respect to the value of the mare, and to the propriety of driving her in harness. I am satisfied she is worth more than five hundred dollars, and consequently that the court has jurisdiction.

On Demass returning to Detroit, plaintiff, finding his agreement had fallen through, and that the mare had been sold to Wilson, the defendant, and had passed into his possession, wrote defendant the following letter: "I am very sorry that you took 'Bay Sallie' away from Demass, as I have made a match against Hendricks to pace next week for five hundred dollars a side; the money is up, and as John (Demass) says you would bring the mare if matched, please ship her at once to Detroit, as there will be a great betting race. Don't fail to send her; if you don't send her, I lose the money that is now up, so don't fail." To Gosnell he wrote a similar letter adding, "Write or telegraph me when she will be here, as we have not fixed the day to pace until I hear from you." Supposing that statement to be true, defendant at once shipped the mare to Detroit in charge of

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an hostler, and on arriving here, plaintiff took possession of her, paid for her transportation and sent her to a stable; he then took the advice of counsel and, acting upon such advice, returned her nominally to the possession of defendant, who soon after arrived here himself, then demanded her of him, and upon defendant refusing to deliver her up, took out this writ of replevin. It appears from the affidavit of Mr. Greusel, owner of the "Tom Hendricks," that his horse had not been matched against the mare at all, nor had he made any agreement with the plaintiff, to pace with the "Bay Sallie," nor had he nor any one for him, to his knowledge, put up any money for such a race. Indeed, Moynahan admits that the only foundation for his letter was, that he had some talk with the owner of "Tom Hendricks" about making a match if he could get his friends to put in with him, and stated that he would see plaintiff again, and that before seeing Greusel again he wrote the letters in question, although he says he had been informed by friends of Greusel there would be no trouble in making a match for five hundred dollars, and "deponent believes that such was the fact, and now expects that he will have no difficulty in making the match." In short, the letters were false from beginning to end, and were evidently intended as a device to get the horse to Detroit. I am satisfied, too, that the subsequent surrender to defendant was solely for the purpose of anticipating a writ of replevin from him, and getting her into his own possession under the writ in this case.

It is perfectly well settled that where a defendant is brought within the process of the court by a trick or device of this kind the service will be set aside and he will be discharged from custody.

The Union Sugar Refinery v. Mathiessen, 2 Cliff. 304; *Wells v. Gurney*, 8 B. & C. 769; *Snelling v. Watrous*, 2 Paige, 315; *Wilson v. Bacon*, 10 Wend. 636; *Metcalf v.*

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Clark, 41 Barb. 45; *Stein v. Volkenhuysen*, E. B. & E. 65; *Wilson v. Reed*, 5 Dutcher, 385; *Carpenter v. Spooner*, 2 Sand. 917; *Prefner v. Rupert*, 28 Iowa, 27.

Though these were all actions *in personam* where the defendant was himself discharged, I see no reason why the same principle will not apply to a case of replevin where property is fraudulently decoyed within the jurisdiction of the court.

A serious question, however, remains to be considered: Plaintiff insists that filing the petition for removal in the State Court was an appearance, and a waiver of any defect in the service of the writ. That the filing of a petition for a removal is an appearance within the meaning of the judiciary act of 1789 requiring the petition to be filed "at the time of entering his appearance in the State Court" was decided, I think correctly, in *Sweeny v. Coffin*, 1 Dillon, 73. A like ruling was made by a majority of the court in the case of *The Chatham National Bank v. The Merchant's Union Bank*, 1 Hun, 702.

While I have little doubt that filing this petition is a sufficient appearance to answer the requirements of the judiciary act, my impression is it cannot be considered as a general appearance in the cause. An appearance has been defined to be a submission to the authority of the court in the case, whether coerced or voluntary, or an act importing that the defendant submits the determination of a material question in his case to the judgment of the court. *Cooley v. Lawrence*, 5 Duer, 610.

It has frequently been held that a motion to dismiss a case for want of jurisdiction is not an appearance, the very act of making the motion implying that the party does not submit himself to the authority of the court. *Sullivan v. Frazee*, 4 Robertson, 616; *Decker v. The N. Y. Belting and Packing Co.*, 11 Blatch. 76; *Commercial Bank v. Slocum*, 14

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Peters, 60; *Ulmer v. Hiatt*, 4 Greene, 439, 441. And I am strongly inclined to think that filing a petition in the State Court, which, according to the better authority, requires no action on the part of that court, and deprives it instantly of its jurisdiction of the case, cannot be considered a general appearance in the cause.

But whether this be so or not, I am satisfied that the petition for removal should not be construed as a waiver of a fraud in procuring the service of the writ. While it is true that a general appearance is a waiver of irregularity in the writ or its service, none of the authorities go to the extent here claimed. In Chitty's General Practice, vol. 3, 522 to 525, an important and suggestive distinction is taken between mere irregularities and such defects as render the proceedings a total nullity and altogether void; for although an irregularity may be waived, if not objected to within a reasonable time, it has been considered to be a general rule that a nullity or essential defect may be taken advantage of at any subsequent stage of the action. In *Taylor v. Phillips*, 3 East, 155, it was held "that service of process on Sunday was absolutely void by statute and could not be made good by any subsequent waiver of the defendant by his not objecting until after a rule to plead given." And to the same effect is *Morgan v. Johnston*, 1 H. Black. 628. A large number of other cases are cited in Chitty, which apparently proceed upon the same ground. While I think the American courts would not go so far in holding that material defects could not be waived, the distinction between irregularities and nullities is noticed and approved in several American cases. In *The United States v. Yates*, 6 Howard, 605, it was said, that leave to withdraw an appearance will not authorize a motion to dismiss for want of citation, nor for mere irregularity in its service, provided the appeal is in other respects regularly brought up and authorized by law.

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"The citation is merely notice to the party and his appearance in person or by attorney is an admission of notice on the record and he cannot afterwards withdraw it; but the appearance does not preclude the party from moving to dismiss for the want of jurisdiction or any other sufficient ground except for the one above mentioned." So in *Carroll v. Dorsey*, 20 How. 204, it was held that a defect in the writ of error or an omission to file a transcript of the record at the term next succeeding the issuing of the writ, were fatal errors, notwithstanding a general appearance. And the earlier case was cited and affirmed. The court held that the appearance of the defendants without making a motion to dismiss cured nothing but the defect in the citation. See, also, *Buckingham v. McLean*, 13 Howard, 150.

There is, undoubtedly, a class of cases which hold that where the State Court has acquired jurisdiction by attachment of property the defendant, on removing, will not be permitted to claim that the case should be dismissed, because the Federal Court would not have had jurisdiction if the case had been originally commenced there. This was really all that was decided in *Sayles v. The Northwestern Ins. Co.*, 2 Curtis, 212, though there are sentences in the opinion which seem to conflict with the views here expressed. So in *Bushnell v. Kennedy*, 9 Wall. 387, it was held, that after removal defendant could not defeat the action by showing it was not originally cognizable in the Federal Court. To the same effect is *Barney v. Globe Bank*, 5 Blatch. 107.

These cases hold that if the defendant, not being compelled to appear in the State Court, does actually appear and remove the case, he thereby submits to the jurisdiction and cannot raise in this court a defense he could not raise in the State Court; but in the case under consideration the defendant was compelled to make this motion somewhere or lose the benefit of the defense. If he allowed the case to go to

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judgment it would probably be too late, the fraud rendering the service of the writ not void but voidable. Advantage must undoubtedly be taken of the defect within a reasonable time, but it does not follow that an act which for some purposes may be considered an appearance and possibly sufficient to operate as a waiver of previous irregularities, should be considered as confirming a fraud in the service of the writ. It is a general rule for which numerous cases may be cited, that in order to confirm a fraud the party injured must not only do some act manifesting an intention to confirm, but must be aware of the legal consequences of the act. Indeed, there seems to be in cases of this class a well-settled exception to the general maxim "*Ignorantia legis neminem excusat.*" Kerr on Fraud, 296; *Murray v. Palmer*, 2 Sch. & Lef. 486; *Cockerell v. Cholmondeley*, 1 R. & M. 425; *Cumberland Coal Co. v. Sherman*, 20 Md. 117; *Cherry v. Newsom*, 3 Serg. 369; *Stump v. Gary*, 2 De G., M. & G. 623. If this rule be applicable here (and I see no reason why it is not) the case is freed from all doubt. There is not the slightest reason for supposing the defendant intended to waive the fraud by removing the case. Indeed, the promptness with which the removal was effected, and this motion made, precluded the idea either of an intention to confirm or a belief that such was the legal effect of his act.

Again: It seems to me inconsistent with the general scope and purpose of the removal acts to compel a party to litigate any portion of his case in a State Court, or lose his defense *pro tanto*. Under the judiciary act, if the defendant had made this motion in the State Court, he would thereby have waived his right of removal, since it was necessary to file his petition at the time of entering his appearance; and while, under the act of 1875, the removal may be made before, or at the term at which the cause could be first tried, and before the trial thereof, it is provided in section 6, that

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in case of removal the Circuit Court shall proceed therein as if the suit had been originally commenced in the Federal Court.

In *Lamar v. Dana*, 10 Blatch. 34, a suit was brought in the State Court for an arrest made by the defendant, during the rebellion, by authority of the President, and the plaintiff moved to remand on the ground that the jurisdiction of the Federal Court over the case had been taken away by the act of 1867. It was held that, notwithstanding this act, the parties could raise any question in the Federal Court after removal which they could raise if the cause had been originally commenced here, and it was said by Judge WOODRUFF, "the removal places the case in the same position here as if so (originally) brought. This operates in this case as in all other cases so removed. Had the cause been brought here in the first instance, all legal defenses would have been available to the defendant, whether they went to jurisdiction to inquire, or were in bar of the action on any ground. All that the removal has done is to change the tribunal which is to pass upon the questions involved." See, also, *Gier v. Gregg*, 4 McLean, 202; *McLeod v. Duncan*, 5 McLean, 342.

There is no doubt that this motion might have been made in the State Court, and that the decision of the State Court thereon would have been *res adjudicata*; but I think the defendant is not compelled to split up his defense in this way. There is no reason to suppose that the removal acts were not aimed at the possible partiality of local judges as well as local influence upon juries, and any construction which would deprive litigants of a judicial interpretation of the law in this court, as well as a determination of the facts involved, would, to that extent, defeat the intention of Congress. The power of removal is not limited to cases where only questions of fact are involved, and this court would

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clearly not be called upon to remand if the sole question in the case were one of law.

Without deciding how far a petition for removal is an appearance, or how far a general appearance would operate as a waiver of a fraud in service of a process, it is sufficient here to say that I do not think that the petition for removal is a waiver of the right of the defendant to insist that the service of the process was procured by a fraudulent device or trick.

But I think the plaintiff has made his motion too broad, in asking that the writ itself be set aside, and vacated. Service of the writ must be set aside, and the plaintiff ordered to return the property to the defendant; and, as defendant came into this district after hearing that the plaintiff had replevied or threatened to replevy his property, and for the purpose of rescuing it, I think the service should be set aside also, as to him.

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FRANK RUSSELL, ASSIGNEE IN BANKRUPTCY OF THOS.
GRIFFIN v. THOMAS McCORD, ASSIGNEE IN BANK-
RUPTCY OF WM. BRUMMELLER.

DISTRICT COURT—WESTERN DISTRICT OF MICHIGAN—
MARCH 15, 1878.

INJUNCTION BILL.

1. When a firm is insolvent and there is a sale by one partner to another for a valuable consideration, this does not of itself constitute fraud.
2. Where an execution is levied after the defendant is adjudicated a bankrupt, no lien attaches on the property so levied upon.

There was a partnership in the boot and shoe business between Brummeller and Vanderwerp. Griffin was a creditor, besides others. Henderson & Co., creditors, finding that the assets of B. & V. were not sufficient to pay their debts, advised Brummeller to purchase the interest of Vanderwerp. They seemed to think that one partner could better manage the business, besides lessening the expense of moving the same. Accordingly Vanderwerp transferred his interest and surrendered the firm assets to Brummeller. Henderson & Co. promised not to press the firm for their claim, but induced the partners to give their note for the amount of the same, with a warrant of attorney. No sooner had this been done than they took judgment against B. & V. and issued execution. This was accordingly levied on the goods in Brummeller's possession.

Griffin now sued Brummeller & Vanderwerp. They defended, but he succeeded in obtaining a judgment, and at once had execution levied on the goods already levied on by the prior execution in favor of H. & Co.

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The general creditors of the firm subsequently, that is in about ten days after the assignment was made by V. to B., filed a petition in bankruptcy against Brummeller, and in this Vanderwerp joined. The latter was adjudicated a bankrupt on September 15 following. McCord, the defendant, was appointed assignee.

McCord now filed a bill against Henderson & Co., and the officer in whose hands the execution was placed, for the purpose of setting aside the lien under execution that H. & Co. claimed they had, on the ground of fraud. The property was sold, and afterwards, as H. & Co.'s debt was arranged satisfactorily, the proceeds were turned over by consent to McCord, assignee, etc.

Griffin was afterwards adjudicated bankrupt, and Russell, his assignee, brought this suit to establish a lien in his favor by virtue of the levy heretofore made and referred to above in favor of G.; and for an injunction restraining McCord from paying out the funds pending the litigation.

Chas. W. McLaren appeared for complainant.

N. A. Fletcher, for defendant.

WITHEY, J.—The case is before me on motion for an injunction. It is claimed that Griffin's execution created a valid lien on the goods as the property of the firm of Brummeller & Vanderwerp, because the transfer by one partner to the other of the firm effects was fraudulent, being intended to hinder, delay and defraud creditors, and also was without consideration. The bill and an affidavit made by Brummeller constitute the showing. The affidavit of Brummeller negatives all charges of positive fraud, or fraud in fact, on the part of the partners, in the sale of the firm effects by Vanderwerp to his partner. The transfer was made in the

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hope and expectation that Brummeller would be able, by the indulgence of their creditors and a reduction of expenses, to work through and pay the debts of the firm. Henderson & Co.'s agent had encouraged this view; they were the largest, or among the largest, creditors, and recommended the course which was pursued. The agent represented to the debtor firm Henderson & Co.'s disposition to be indulgent as creditors, and not press payment, and that they would not make use of the warrant of attorney to take judgment unless driven to do so by other creditors. It appears that both Brummeller and Vanderwerp placed implicit reliance upon those representations and assurances, and as debtors are naturally inclined, they took the most hopeful view of their affairs, and acted with the best intention, with no view to hinder, delay or defraud creditors. It may be, and probably is, true that Henderson & Co.'s agent was acting in bad faith, but they gained nothing by the course pursued.

Was, then, the sale by one partner to the other of the firm assets, a fraud in law upon the firm creditors, of whom Griffin is one? This question is raised under the Statute of Frauds, and not under the bankrupt act.

It is undoubtedly the rule, when the Statute of Frauds is under consideration, that positive intent to commit fraud—fraud in fact, as it is called—and also constructive fraud, denominated fraud in law—that is, when the necessary effect of a transfer is to hinder or delay creditors, without positive intention—alike render a sale void as to creditors, who, through judgment and execution, or by bill in equity, attack the transfer. It appearing there was no actual fraud, was there constructive fraud? A transfer by one member of firm to his co-partner, of firm assets, under ordinary circumstances, is as permissible and valid as a transfer by one individual of his property to another individual. Such transfer passes title, and is good against all the world unless the neces-

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sary effect is to defraud creditors. It has often been held that where a firm is insolvent, that of itself will not avoid a *bona fide* sale to one of the partners of the joint assets, and it cannot be necessary to refer to the judgments which have so determined. *Ex parte Peak*, 1 Madd. 346; Lindley on Part. 758. What is claimed is, that the transfer, by one partner, of the firm property was necessarily fraudulent, because it hindered and delayed the joint creditors in the collection of their debts. We are unable to understand how the effect claimed by complainant necessarily resulted from the transfer. The goods and entire assets in the hands of Brummeller, after the sale to him, were liable for the debts of firm creditors who should come armed with judgment and process as much as before the sale. Both partners, and each are liable to the joint creditors, and the individual property of both partners remained liable for joint debts after, as before, the transfer. No part of the firm property had been withdrawn from the reach of firm creditors. Vanderwerp withdrew no assets of the firm from the business, and he is not shown to owe individual debts. How, then, does it appear that the firm creditors were hindered or delayed in the collection of their debts by the mere act of one partner selling to the other? It is claimed that Brummeller owed \$300, private debts, besides the notes given Vanderwerp, aggregating \$300 for his interest in the firm property, and that in view of the firm's insolvency, the effect in consequence of bankruptcy is to postpone firm creditors to these individual creditors. If we concede such to be the effect in the bankruptcy, which would not be the case as to the \$300 indebtedness to Vanderwerp, as he should not be allowed, being one of the debtors, to share in dividends as against firm creditors, how does the effect produced by the bankruptcy proceedings commenced after the transaction we are investigating, render the previous sale, constructively fraudulent, as hindering or

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delaying creditors? Bankruptcy, which followed very soon after the sale, was not the necessary result of the sale.

It was the entering of judgment against both members on the note, and warrant of attorney by Henderson & Co., and their levy on the goods in Brummeller's possession, in violation of Brummeller & Vanderwerp's understanding of the treatment they were to receive from those creditors, which precipitated the bankruptcy proceedings.

The sale was prior to, and should be judged independently of the subsequent bankruptcy proceedings, caused by the action of one of their creditors, and not by one partner selling to the other. The bankruptcy was not the result of the sale, and if not, there was no constructive fraud in the sale.

The following judgments fully sustain the views we have expressed: *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Ves. 6; *Howe v. Lawrence*, 9 Cush. 553; *Robb v. Mudge*, 14 Gray, 534.

But it is said the sale was without consideration. There is no ground for this proposition, inasmuch as Brummeller's agreement to pay all the firm debts was a good consideration, and further, he gave his notes to his partner for \$300.

Complainant's execution was levied after the petition in bankruptcy was filed by firm creditors against Brummeller, on which he was adjudicated, and when the goods were in the latter's possession. No lien could therefore attach against the assignee in bankruptcy, unless the sale to Brummeller was fraudulent in fact, or by necessary construction of law, so that the goods still remained at the date of the levy, firm assets and firm property. Such not being our view of the facts, the injunction asked is denied.

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THE GENERAL BURNSIDE.

CIRCUIT COURT—EASTERN DISTRICT OF MICHIGAN—MARCH
29, 1878.

MATERIAL MEN IN THE FOREIGN AND HOME PORT—LIENS OF SAME
ON EQUAL FOOTING—WHEN.

1. Material men furnishing supplies in the home port, where the State law gives a lien, have a lien of equal rank with material men furnishing supplies in a foreign port. There is no preference of payment in their claims.

2. The clerk of the District Court placed claims for supplies furnished in Canadian ports in a higher rank than claims of domestic material men. This was excepted to on the ground that all material men should stand on an equal footing, and the exception was sustained by the Circuit judge on appeal.

John J. Speed and *Geo. E. Halliday*, for those excepting.

J. J. Atkinson, opposed.

The case was heard December 21, 1876, in the District Court, by

BROWN, J.—The sole question presented by the exception is whether claims for necessities furnished in foreign ports are entitled to be paid in preference to those furnished in a port of the State where the vessel is owned, for which a lien is given only by the State law, or whether they should share alike and be paid *pro rata*. The gist of the argument contained in the very elaborate brief of Mr. Speed is to the effect that while there is no lien by the general law maritime as administered in this country, for necessities furnished in the home port, such lien may be created by the State law,

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and when so created is not only enforceable in this court, as laid down in the case of *The Lotawanna*, 21 Wall. 558, but becomes to all intents and purposes a maritime lien of equal rank with those existing in favor of foreign creditors. The last inference, however, does not necessarily follow. In determining the relative rank of different liens, courts are constantly in the habit of examining their character, and the time and circumstances under which they accrued, marshaling them in the order of their merit. I think there is a well-founded distinction between liens created at home and abroad, in the presumed necessity for credit in a foreign port, which does not exist in the domicile of the owner. This necessity of credit is recognized in the law maritime, but not in the State legislation, which confers the lien whenever the supplies are furnished, whether it be necessary to pledge the credit of the vessel or not; at least, such is the general construction given to the State statutes. 2 Pars. on Shipping, 154; *The Young Sam*, 20 Law Rep. 608.

Now, if foreign and domestic material men are put upon the same footing, the former, who furnish upon the credit of the vessel, really labor under a disadvantage, since the proceeds, which would otherwise be used to pay them, are absorbed by the home creditors, who, in reality, trusted to the credit of the owner; and as it is not every State which confers these liens it would be necessary for the foreign creditor, in order to protect himself, not only to inquire where the vessel is owned, but how far the laws of the owner's domicile put him at the mercy of domestic creditors.

This is substantially the line of argument adopted by Judge LEAVITT in the case of *The Superior*, (Newberry, 176-184,) where the question at issue here was discussed. Although at that time the lien created by the Ohio statute did not attach until seizure, the decision was not put upon that ground; but the rule was broadly laid down that in

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distributing the proceeds of sale maritime liens would be preferred to those created by the State law. "I am not aware that it has been anywhere admitted that State legislation can interfere with, supersede, or destroy a right or lien previously acquired under the national maritime law. On the contrary, the existence of such a power in the States has been strongly denied. They may declare that a lien shall exist in cases designated, and provide for its enforcement by a seizure *in rem*; but, clearly, the lien so acquired must be subordinate to those existing before in favor of other parties."

This decision has been followed, so far as I know, throughout this circuit. Reported cases are rare, but they are uniform. The principle was acquiesced in by court and counsel in *The St. Joseph*, (Brown's Admiralty, 202,) and in the recent case, decided by the same judge, of *The Alice Getty*. In the still later case of *The John T. Moore*, in the Circuit Court for the district of Louisiana, Judge Woods held that, even if the State liens were recorded pursuant to the statute, they must be postponed to maritime liens. In *Scott's Case*, (1 Abb. U. S. 336,) the relative priority of mortgages and material men in the home port was elaborately argued, but no question was made that foreign material men were entitled to be preferred to mortgagees. The court observes in speaking of maritime liens: "There was no question as to the validity and priority of these liens, and under former orders of the court they have been paid." Indeed, in all the cases where the mortgagee has been held to rank lien holders under the State laws it has, apparently, been assumed that the decision would be different if the contract were between a mortgagee and foreign creditors. In *The Grace Greenwood*, 2 Biss. 131, the admiralty liens were paid before the contest was made. I had occasion to consider these authorities in the case of *The Theodore Perry*, in which I held that the mortgagees stood only in the place of

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owners to the amount of their mortgage, and that domestic material men were entitled to rank them.

The only adjudication claimed by counsel for domestic creditors to be directly in their favor is that of *The Cannon, Raleigh and Astoria*, recently decided in the district of Virginia. On a careful perusal of this case I do not find this question to have been passed upon, though there are intimations, as in other cases, that the liens of the State laws are of equal validity with strictly maritime liens. The learned judge did say that these liens took precedence of all liens, other than those for mariners' wages, but the question was not between foreign and domestic creditors, but between material men and a mortgagee, and the court adopted what I have considered the better law, that such liens were entitled to rank a mortgage; following *Reeder v. Steamship George's Creek*, 3 Am. Law Reg. 236. I am informed, too, that the practice of the clerks in many of the eastern districts, in the distribution of proceeds, is to place domestic and foreign material men in the same rank; but if this practice, unsanctioned by judicial authority, is entitled to any weight in other districts, it is fairly offset by the uniform practice in this district, ever since the organization of the court, to prefer the claims of foreign creditors.

It is not denied that the application of this rule will lead to apparent injustice in certain cases where the foreign port is much nearer the domicile of the owner than many ports in his own State, which, under the law as settled by the Supreme Court, must be considered as home ports; as, for example, in holding Jersey City to be a foreign port to a New York vessel, while Buffalo and Ogdensburg are domestic, or in regarding Toledo and Windsor as foreign to Detroit, while Ontonagon and St. Joseph are domestic. This difficulty, however, has arisen from the practice of treating any port in the same State as a home port. Indeed, the use of

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the term home port is unfortunate and misleading. The true distinction is between foreign and domestic vessels, the uniform current of American authorities holding each State in this regard foreign to every other. *The General Smith*, 4 Wheat. 438; *The Belfast*, 7 Wall. 624-43; *The Nestor*, 1 Sum. 73; *The Lulu*, 10 Wall. 192-200; *The Rich*, 1 Cliff. 308. This distinction, adopted from the admiralty law of England, where the line between foreign and domestic commerce is of course clearly marked, is founded in no good reason here, since nearly all the domestic commerce, properly speaking, of this country is between different States, and therefore legally foreign to each other. Taking into consideration the national character of our inter-state commerce, it seems to me that either all vessels of the United States should be considered domestic, or, if the words "home port" were used, that only the actual domicile of the owner should be considered the home port, and every other port, either in the same or another State, should be considered foreign. The latter view was actually adopted by the learned judge for the district of Oregon in the case of *The Favorite*, 7 Chicago Legal News, 395, but was criticised by Judge DILLON in *The Albany*, 4 Cent. Law Jour. 16. In view of the settled course of decisions upon this point, I cannot but regard *The Favorite* as a departure from the hitherto accepted law, and so far unsound, but I regard it as extremely unfortunate that the line between foreign and domestic creditors was drawn exactly as it is. As an enunciation of what the law ought to be I fully coincide in the opinion of Judge DEADY.

But with regard to the main question in this case, viz., the preferential character of foreign material men, it seems to me too well settled, both in practice and upon authority, to be now disturbed.

The exceptions are, therefore, overruled.

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There was an appeal to the Circuit Court, when the foregoing decision was reversed by

BAXTER, J.—This case presents a question which has frequently arisen in the admiralty courts of the lake districts, as well as at other points. This was a Michigan vessel, owned in Detroit. Upon the sale it did not realize enough to pay all the liens existing in favor of the material men here, and the foreign creditors—I mean foreign in the view of the admiralty law—who are claiming precedence over the Michigan creditors upon the ground that their claims are foreign, while the Michigan claims are domestic.

I find, on examination, that in every commercial country excepting England and the United States this distinction between foreign and home liens has been entirely ignored; that it does not exist anywhere else, and that it does not exist in the United States as it does in England, and that it exists here only in a modified form. Various reasons have been given for drawing a distinction between a home port and a foreign port in the English admiralty law. It is supposed by some that the distinction is founded upon the fact that the owner of the vessel is presumed to have credit in his own port, and that, therefore, the credit is given to the owner and not to the vessel. But the true reason, I think, is very plain, and grew out of the contest that was waged for a long time between the admiralty and common-law jurisdictions of England, in which the common-law courts prevailed, and settled and determined all cases of admiralty jurisdiction, unless the question arose with reference to matters which occurred upon the high seas, asserting that no maritime liens could attach except upon the high seas, as they were not maritime transactions. When our courts began the administration of the admiralty law they departed from this practice and adopted the opposite doctrine, asserting the admiralty jurisdiction upon all waters, including the

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interior navigable rivers and lakes, disregarding the criterion of tide-water, etc.; and, if I may be permitted to say so, necessarily, and, I think, upon principle, placed themselves in a position which should have induced them to adopt the theories of other commercial countries, which ignored distinctions made between home and foreign ports. Our commercial marine is a National affair. It is made so by the Constitution. Exclusive jurisdiction in admiralty is given to the Federal Courts, and it ought to be treated as a National affair and delocalized. But we have fallen into a kind of mongrel system, between the civil and English admiralty practice, and have adopted the idea that a vessel, owned and registered in one State, is as to another State a foreign vessel, and have given to our commercial marine a double character, national in one respect and local in another.

I am aware of the fact that many decisions have been made in cases of this kind, upon the precise question upon which I have to pass, to the effect that the lien of a creditor from another State is entitled to preference over the lien of the home creditor. It has been well determined by the Supreme Court of the United States, and by all the courts, that under the general admiralty law—following the English law in that respect—there is no lien for supplies furnished in a home port. But the courts have stated that it is competent for the States to legislate and give a lien; and the States of Ohio and Michigan have so legislated, and have given that lien. The Supreme Court have decided, further, that this lien can only be enforced through the Federal tribunals.

There are different grades attached to admiralty liens. A material man is always ranked by a salvor or by a seaman; but the creditors who are protesting here, as I understand the facts, are claiming for supplies furnished, and the question is whether a State can give a lien, and if in point of fact the States have given a lien. If they have, that lien,

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under the decision of the Supreme Court, can only be enforced through the Federal Court, exercising its admiralty jurisdiction. And the question is, is there any reason left for drawing a distinction between these classes of claimants, giving the preference to one who has acquired a lien under the general admiralty law, over one who has acquired a valid lien under the State law? The weight of authority—that is, the greater number of decisions that have been made upon this question—is decidedly in favor of the decree rendered by the District Court. There are decisions, however, the other way. This particular question has never been decided by the Supreme Court. The doctrine which had been established by the majority of the adjudications of the minor courts would, in my judgment, lead to a good deal of injustice, conflict, and confusion. Sitting as a Federal judge in the State of Michigan, administering law for the citizens of Michigan, it would seem to be the first duty of the court, if it made any distinctions, to take care of the rights of its own citizens as against foreign citizens. The rule that has found its way into the books, and which has been sustained by quite a number of able and respectable jurists, is, in effect, that in a conflict between a material man in Windsor, across the river, and a material man in the State of Michigan, in the city of Detroit, this court would be bound to exclude its own citizens for the benefit of the citizens living across the river. The confusion and conflict that would arise in the frequent passage of vessels up and down these waters can readily be imagined.

The courts of the United States have made some innovations in order to adapt the admiralty laws to the exigencies of our situation to inland navigation; and, if there were decisions by the Supreme Court of the United States upon this question, I should, of course, adhere to them, and so administer the law; but as there are none, though there are

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conflicting cases in the minor courts, and I think the majority are in favor of the decree of the District Court,) the same ruling having been made by the learned judge of the western district, by Judge DRUMMOND of Chicago, and by Judge SHERMAN of Cleveland,) yet these are decisions reached by subordinate tribunals, reasoning from analogy, and I do not know but they have gone so far as to be obligatory upon other judges. In this particular case, however, I hold that I am at liberty to look to and decide upon first principles, considering the question as an open one. In administering the law upon this question I have determined to mete out equal justice to every one, and to recognize the claims which the laws of the State give to parties. It cannot be said that when a law of Michigan confers upon or invests a party with a good and valid lien, that that lien, thus created, cannot assume an equality of right with liens arising by implication of law. If I should make a mistake in thus holding, it will not affect a great deal in this particular case, and perhaps the decision may attract some attention from Congress, inducing some legislation reconciling this conflict and establishing a uniform national code. I think a point has been reached where we can only get out of these numerous difficulties, originating, I think, in an erroneous holding in the beginning of our government, by congressional legislation.

Acting upon these views I will direct an order to be entered reversing the decree of the court below, and distributing the proceeds *pro rata* among the parties.

For what is said on page 145, lines 17 and 18, and the authorities there cited, see *The Illinois, White and Cheek* (note) in this volume. [Reporter.

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HALL & EDDY v. WM. LITTLE ET AL.

CIRCUIT COURT—DISTRICT OF KENTUCKY—APRIL 13, 1878.

1. COLLISION—THE VESSEL IN FAULT—NEGLIGENCE.—The result of the authorities, English and American, is that when a collision occurs between a vessel in motion propelled by steam or sail, and a vessel or other thing at rest, the vessel in motion is *prima facie* in fault; that it can excuse itself only by showing the cause of the disaster, and that it must appear on such showing that the cause was not one of the ordinary forces of nature, but something unexpected, as a sudden storm, an unknown current or unexpected derangement of machinery, which could not have been anticipated or guarded against by the exercise of ordinary nautical skill.

2. BURTHEN OF PROOF.—Neither in a civil nor criminal case does the burthen of proof ever shift. It remains on the party on whom it rested in the beginning.

3. TRUE RULE AS TO NEGLIGENCE.—When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

4. COLLISION IN DAYLIGHT—PRESUMPTION.—When the collision occurs in broad day light the legal presumption is that the accident was occasioned by the fault of the vessel in motion.

5. PILOT—ACCIDENT UNAVOIDABLE.—The proof as to how the pilot turned his wheel, and that his management was proper under the circumstances, by himself and others—and that proper nautical skill was used, is a very different thing from showing that he was skillful, and in the emergency did, in his opinion, exercise his best skill and judgment. The fact that the pilot did what his best judgment dictated may prove his want of judgment, but not that the act was unavoidable.

6. WHAT NEGLIGENCE PLAINTIFFS MUST SHOW.—To entitle plaintiffs to recover it is not incumbent on them to show the specific act of negligence committed by defendants. It is superfluous to inquire wherein the steamboat was not managed with proper nautical skill when the collision was caused by a vessel having the power to move or stop at pleasure in a channel of sufficient breadth, without any superior force compelling her to

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the place of collision. It is not necessary for the plaintiff to trace specifically in what the negligence consists, and if the accident arose from some inevitable fatality, it is for the defendant to show it.

The facts are fully stated in the opinion.

Jno. Mason Brown, Isaac Caldwell and G. C. Wharton,
for plaintiffs.

Bijur & Davie, for defendants.

BALLARD, J.—This cause was tried by the court without a jury, in virtue of a written agreement of the parties.

On the 1st of August, 1875, the steamboat *Brilliant*, owned by the defendants, landed a heavy tow on the south side of the "Towhead" or island in front of Louisville, and about three hundred or three hundred and fifty feet below its head or upper end. The tow consisted of two rafts which were lashed together, and two barges. One of the rafts—that is, the one which lay out in the stream—was composed of five strings of logs, and the other of six strings, and in front of the rafts constituting a part of the tow were two barges loaded with coal and bricks. The tow was more than three hundred feet long, and was very heavy. It was, however, landed without difficulty and with safety, though the river was rising rapidly and there was a strong current running diagonally from the point or head of the "Towhead" to the Kentucky shore. The channel between the "Towhead" and the Kentucky shore is not much used by steamboats, but is extensively used as a safe deposit for flat-boats and rafts, which lie along and are attached to either shore. At the time the *Brilliant* landed her tow, as above mentioned, the plaintiffs had a large raft lying attached to the Kentucky shore, very nearly opposite to—perhaps a little below—the tow, and there were lying along the same shore below the

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raft of the plaintiffs many other rafts. There were also lying along the shore of the "Towhead" below the tow many rafts, the first of which was distant from the tow three hundred and six feet.

After the Brilliant had landed her tow in safety, and had notified the owners thereof, said owners, apprehending danger to their logs from the rising river, employed the Brilliant to remove a portion of the tow, that is, the outer raft or five strings of logs, to their mill, situated on the Kentucky shore about a mile below. The precise time when the Brilliant undertook to perform this task does not very satisfactorily appear; but, giving due weight to the conjectures of witnesses, and to all that transpired, I think it fair to assume that about one hour elapsed between the first landing of the Brilliant with its tow and this attempt.

In the performance of its undertaking the steamboat seems to have been utterly powerless. It seems to have been entirely at the mercy of the current. The pilot was unable to steer it. Though the raft lying below was plainly visible he could not or did not so steer his boat as to avoid it. He allowed his boat and tow to drift or be forced by the current against this raft. The consequence was that the boat, which was attached to the upper end of its tow, was driven across the channel and it and its tow coming in contact with the plaintiffs' raft broke therefrom a large number of logs, many of which were never recovered. The value of the logs wholly lost amounts to \$1,800.

The pilot of the Brilliant was possessed of competent skill, and the boat was, at the time of the accident, in all respects properly manned. The pilot testifies that he used his best skill to avoid the obstruction below, and to get his boat and tow into the current, but he failed. He had but a short time before so steered his boat in the same current as to manage and safely land a large and heavy tow, and he did not doubt

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his ability, with the same boat, to manage less than half the original tow in bulk and much less than the half in weight. There is no direct evidence as to the quantity of steam the boat was carrying. The engineer was not called to testify. He has not been for some time connected with the boat. He has gone South, and it seems his testimony could not have been procured without much difficulty, if at all. The pilot, however, testifies that the engineer was subject to his orders—that his duty was not to reduce the steam without his order, to be given by the ringing of a bell; that he gave no such order, and that when the boat moved off, it “felt and moved” as if it were supplied with sufficient steam.

How the pilot steered his boat; what precise manœuvre he made does not satisfactorily appear. All that appears is that he steered his boat in that way which he thought was best calculated to bring his tow into the stream and avoid the obstruction below.

The plaintiffs claim that they have sustained loss through the negligence of the defendants. Their action is grounded on negligence, and in my opinion, the burden is on them to establish the negligence. But having shown the circumstances under which the injury was sustained; having shown that their logs were lying at the shore; that the defendants’ boat, in daylight, unaffected by any wind, ran into or came in contact with them, and inflicted the injury complained of, I think the plaintiffs have established a *prima facie* case of negligence, which is not affected by any testimony or explanation offered by the defendants. I do not say the plaintiffs, having shown certain facts, that the burden of proof which was on them in the beginning has shifted to the defendants. I have heretofore repeatedly said that, in my opinion, the burden of proof never shifts in either a civil or a criminal case, and that it remains on the party on whom it rests in the beginning. What I do say, however, is that the plaintiffs,

having shown the circumstances under which the injury complained of was inflicted, I should conclude they have established a *prima facie* case of negligence which entitled them to judgment unless I shall conclude that the facts, proven by the defendants, established that the accident arose from a cause other than the want of care.

The true rule is, I think, to be found in the case of *Scott v. The London and St. Catherine Docks Co.*, Hurlstone & Coltman's Reps. 3 Exch. 594. It is there said that "when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

To the same effect are many other cases. In *Warren O. Bowas v. The Pioneer Tow Line Co.*, 2 Sawyer's Reps. 21, the court says, "The collision occurred in broad daylight. * * * The legal presumption * * * is that the accident was occasioned by the fault of the vessel in motion," etc.

In the case of *The Scioto*, Davies Reps. 361, Judge WARE says: "It may be assumed as a general rule that when a collision takes place between a vessel under sail and a vessel not under sail, the *prima facie* presumption is, that the fault is imputable to the vessel in motion." See *Strout v. Foster*, 1 How. S. C. R. 89.

It is unnecessary to further illustrate this doctrine. Defendants counsel admits its correctness; but they claim that they have met the plaintiffs' *prima facie* case. They claim they have shown that their boat was properly equipped and manned; that it was supplied with sufficient power or steam; that it was properly navigated; that there was a strong current running from the place where it lay to the place where plaintiffs' raft was lying, and that there was an eddy formed at the bow

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of their tow, the tendency of whose current was to force the head of the tow towards the island and the obstruction below.

I cannot admit that the plaintiffs have shown to my satisfaction all which they claim to have shown. It is not shown to my satisfaction that the boat was properly navigated, and it is very far from being shown that it was supplied with sufficient steam. It is one thing to prove by the pilot what he did, how he turned or managed his wheel, and by him and others that such management was proper under the circumstances, such as was demanded by the exercise of proper nautical skill, and quite a different thing to show that the pilot is skillful, and that in the emergency he did, in his opinion, exercise his best skill and judgment. To adopt the language of Judge GRIER in the case of *The Louisiana*, 3 Wall. 174: "The fact that the pilot did what his best judgment dictated may prove his want of judgment, but not that the accident was unavoidable." It may prove that however skillful he was ordinarily he was on this occasion wanting in skill.

In respect to the boat being supplied with sufficient steam, it has been seen the defendants offered no direct testimony. The engineer to whom only the fact was known was not called. The pilot is the only witness produced by defendants who speaks to the fact. He, however, does not speak to the fact itself. He could not speak to it because it was not within his knowledge. He speaks only of other facts, on whose existence he bases his argument and conclusion that there was sufficient steam. On the other hand, Hall and other witnesses produced by the plaintiffs, testify to facts on which they base their argument and conclusion that there was not sufficient steam. They testify that the steamer did not have sufficient steam. They do not mean to be understood as saying that they examined the steam gauge. They

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mean only, that from what they saw, the landing in safety by the steamer, a short time before, of a tow much heavier than that which it undertook to move; the utter inability and failure of the boat to control the lighter tow; the drifting of the boat and tow with the current, they concluded that the steamer was powerless. In my opinion, the facts proven by these witnesses, which facts are confirmed by all the witnesses who have been before me, are quite as significant as those testified to by defendants pilot, and, in my judgment, the conclusion deduced from them by the witnesses is much more fully justified than the conclusion of the pilot.

Upon precisely similar testimony the Supreme Court in the case of *Culbertson v. Shaw*, 18 How. 586, assume the steamer Southern Belle was not supplied with sufficient steam.

It follows as a necessary deduction from the rules of law hereinbefore stated, that to entitle the plaintiffs to recover it is not incumbent on them to show the specific act of negligence committed by the defendants. It is, however, not necessary that such a conclusion should be left to be inferred; it is distinctly and directly declared by the Supreme Court, in the case of *The Granite State*, 3 Wall. 314, and by the Court of Exchequer in England, in the case of *Skinner v. The London, Brighton & South Coast Railway*, 5 Exch., W. H. & G. 786. In the first case the court say, "Under such circumstances we are not called upon to inquire wherein the steamboat was not managed with proper nautical skill. * * * Such inquiry is superfluous when the collision was caused by a vessel having the power to move or stop at pleasure in a channel of sufficient breadth, without any superior force compelling her to the place of collision." In the latter case the court say, "it is not necessary for the plaintiffs to trace specifically in what the negligence consists, and if the accident arose from some inevitable fatality, it is

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for the defendants to show it." But were it incumbent on the plaintiffs to trace the specific act of negligence which caused the collision, I should be inclined to say they have sufficiently done so. I should be inclined to say they have established, by the weight of evidence, that the collision arose from the fact that the steamer was not at the time supplied with sufficient power or steam. In no other way than on this assumption can I understand why the steamer did not yield to the skill of the pilot, if, indeed, he used his usual skill. In no other way can I account for the boat drifting as helplessly as the raft itself would have drifted without her.

But the defendants contend that their boat did not drift. They insist that it was driven by the cross current, which was due to the great height of water, against the plaintiffs' raft, in spite of the fact that it had sufficient steam and was skillfully navigated. They insist that, as it was not shown *affirmatively* that their boat was either unskillfully navigated or insufficiently supplied with steam, and it was shown that it was obliged to encounter a strong cross current, the court must ascribe the catastrophe wholly to the irresistible action of the current, and cannot impute to the boat any want of care.

The fallacy of this contention lies in the fact that the current, though violent, was not unusual. It was the usual current incident to the state of water. It was the same current on which the defendants had first landed their heavy tow, and which they had thus demonstrated might be guarded against by the exercise of proper skill. Boats which navigate the Ohio river, in either high or low water, must be held to a knowledge of the currents incident to the state of water, and they must be held responsible if they allow themselves to be driven by such currents to the infliction of injury to the property of others.

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The books are full of cases which establish the correctness of this position.

The Margaret, 94 U. S. Reports, 494; *The Louisiana*, 3 Wallace, 173; *The Granite State*, 3 Wallace, 310; *Ure v. Coffman et al.*, 19 Howard, 56; *Rogers v. Steamer St. Charles et al.*, 19 Howard, 108; *New York & Virginia Steamship Co. v. Calderwood et al.*, 19 How. 241; *The Clarita*, 23 Wall. 13; *The Sea Gull*, 23 Wall. 165; *The Great Republic* 23 Wall. 29; *Culbertson v. Shaw*, 18 How. 584; *Niles Works v. Page*, 24 How. 228; do, 313.

Notwithstanding this array of authorities to which many more, both English and American might be added, the counsel of defendants rely with apparent confidence on the case of *The Farragut*, 10 Wall. 334. The facts of this case are not stated either by the reporter or the court. The respective allegations of the libel and answer only are given. By the libel it was sought to recover of the Farragut for the benefit of the Buckeye Mutual Insurance Company the loss which its assured had incurred by the alleged careless navigation of the Farragut in towing the canal boat Ajax through the railroad bridge which spans the Illinois river at Meredosia. The answer denied the negligence and set out what occasioned the loss.

Both the Circuit and District Courts found that the defense was sustained by the evidence.

The proctor of the libellants in his argument imputed to the boat only one act of negligence, to-wit; its failure to have a proper lookout. The court throughout nearly the whole of its opinion confines itself to the consideration of the libellants' proposition, and, in the last paragraph, which consists of four lines only, it says "it is also evident that the loss was occasioned by the violence of the cross-current, which was due to the great height of water prevailing at the

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time, and was therefore the result of one of the ordinary dangers of navigation."

It is quite evident the court considered that as the insurance company had insured the Ajax against the "dangers of the river," and the Farragut had, by its contract, exempted itself from responsibility for loss arising from the usual dangers and hazards of river navigation, the loss should be borne by the insurance company which undertook to pay such loss, and not by the Farragut, which had attempted by contract to exempt itself from loss occasioned by one of the ordinary dangers of the river.

The court does not discuss, and I do not think it even considered, how far it is the duty of steamers navigating our rivers to guard against the ordinary effect of known currents.

I take it to be the result of all the authorities, English and American, that, when a collision occurs between a vessel in motion propelled by sail or steam, and a vessel or other thing at rest, the vessel in motion is *prima facie* in fault; that it can excuse itself only by showing the cause of the disaster; and that it must appear on such showing that the cause was not one of the ordinary forces of nature, but something unexpected; such as a sudden storm, an unknown current, or an unexpected derangement of machinery, which could not have been anticipated or guarded against by the exercise of ordinary nautical skill.

Here, as we have seen, the plaintiff's raft was at rest; the defendants boat was in motion propelled by steam. There was no storm, no sudden wind, no derangement of machinery, no unknown current, in short, nothing to excuse the disaster. The irresistible conclusion is that the steamboat should be condemned as in fault, even if the evidence touching the specific act of neglect—its failure to have sufficient steam—were less satisfactory.

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The plaintiffs may have judgment for \$1,800 damages and their costs, and the attachment granted by the State Court before the cause was removed into this court must be sustained.

STEPHEN B. STURGES, ASSIGNEE OF HUBBARD COLBY, BANKRUPT, v. HUBBARD COLBY, DENISON UNIVERSITY, AND OTHERS.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—APRIL TERM, 1878.

SUBSCRIPTIONS, WHEN LEGAL OBLIGATIONS.

1. Subscriptions in aid of college endowments become fixed and legal obligations as soon as the college performs its undertaking.
2. Thus becoming valid contracts they may be proved in bankruptcy.
3. Whenever the subscriptions are settled by giving promissory notes, every presumption of law favors the validity of the transaction, and the *onus* of proof is on the one denying it, if he would impeach it.

Durlam & Seyman, for complainant.

Bishop & Adams, for Denison University.

WELKER, J.—This was a proceeding by the assignee to settle and have declared the liens of the different lien holders on the bankrupt's estate, and the amount and priority of such liens, and for a sale of the property.

The Denison University was made a party defendant, and

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called upon to answer and state the amount of its claim and the nature thereof. To this the University answered, setting forth its claim and mortgage to secure the same as herein-after stated.

After the coming in of this answer, the plaintiff filed a supplemental petition setting forth that a portion of the debt secured to the University was a gift voluntarily made by Colby while insolvent, and should be set aside as to creditors, it being a *subscription* to the University endowment fund.

To this supplemental petition the University *answered*:

1. Denying the charge of insolvency.
2. If the facts stated in the supplemental petition were true as to the insolvency, the consideration of so much of the University claims as are founded on subscriptions to its funds, as in its answers set forth, was sufficient and valid.

The character of the subscription will appear in the subsequent statements in this opinion.

By the answers of the University it is seen that disclosures are called for both by the original and supplemental bills. These answers being responsive to the requirements called for by the petition, no testimony is needed to sustain the answers. It will be seen that to set aside a portion of the University's claim the supplemental petition alleges that ever since 1864 Colby has been insolvent. This is denied, and it is denied that he was insolvent in January, 1872, or before that time. The answer to the supplemental petition then states in substance that in the fore part of the year 1865 the University, through its agents to carry out more fully the objects of its organization, proceeded to raise an endowment fund of \$100,000, and Colby subscribed \$2,000; and at great expense said University proceeded until the full sum of \$100,000 was subscribed and raised. That said Colby examined said subscriptions and fund raised, and *found* and

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agreed with this defendant (University,) and represented to and agreed with the other subscribers to said fund that said \$100,000 had been raised. And, therefore, said Colby, *in satisfaction* of his subscription, in November, 1866, gave his note for \$2,000, dated November 1, 1866, at two years, with interest annually from November 1, 1866. Said Colby induced others to settle their subscriptions to said fund.

Said \$2,000 note was taken in payment of said Colby's subscription. That in consequence of said subscriptions, greatly increased expenses and extension of facilities have been entered upon by said University.

That in January, 1872, the University was in need of a new building and sought subscriptions for it, and Colby subscribed \$500, and paid down \$100. The building was built on the strength and faith of this and other subscriptions.

That March 27, 1872, Colby made a loan of said University of \$7,500, part of said endowment fund, and gave the mortgage set out and attached to the answer to the original bill. Of this \$7,500, the sum of \$2,052 was for amount due on said note of \$2,000 given in settlement and satisfaction of said original subscription; and \$400 was for the second subscription, being the one of \$500. The balance to make said \$7,500 loan was advanced in cash, being \$5,048.

Both of said subscriptions were in manner aforesaid satisfied, *settled* and discharged.

The facts of the case being as before stated, we will proceed and see what the law as applicable to this state of facts is.

In Ohio it is the policy of the law to promote and favor the interests of education.

In 16 Ohio State, on page 27 (*Ohio W. Female College v. Love's Ex.*) Judge SCOTT, in giving the opinion of the court, says: "It has at all times been the declared policy of this State to favor and promote the interests of education and the

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general diffusion of knowledge among the people. To this fact the provisions of the Constitution itself, our system of school laws and acts providing for the incorporation of institutions of learning, bear ample testimony."

On page 28 the court further say:

"This subscription then was authorized by law. It was evidently intended by the maker that the managing officers of the corporation should rely upon it as a part of the means and resources of the institution. It was but reasonable that they should rely upon the solemn pledge thus given, and incur liabilities upon the faith of it. And that such liabilities were in fact incurred, the petition distinctly avers."

The question here raised is not a new question in courts of bankruptcy.

It was before the United States Court in and for the district of Delaware, and was decided about the year 1875 in the case of *Capelle v. Trinity M. E. Church*, 11 Bankrupt R., p. 536.

The following is the syllabus of the case:

"A claim was proved by a church corporation, founded upon a verbal promise by a bankrupt to M. that he (the bankrupt) would pay \$800, if M. would subscribe a portion of the indebtedness due from the church to M., the promise being subsequently publicly announced in the church in the presence of the congregation. It appeared by the proof that the expenses had been incurred by the trustees of the church upon the faith of the subscriptions generally, though not that any definite expenditure was made on the faith of this particular subscription.

"*Held*, That the promise was founded on a *good legal* consideration upon two alternative grounds. It is one of two mutual promises for the benefit of the church, each being the consideration of the other, and the claim provable by the beneficiary; and, *secondly*, as a promise to the church,

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partly upon which expenses were incurred, it would sustain an *action of assumpsit*, and might be proved in bankruptcy."

See also *Amherst Academy v. Cows*, 6 Pick. 427, particularly as to consideration and burthen of proof, notes being given.

The case of *Farmers' College v. Executors of McMicken*, 2 Disney, 495, is another Ohio authority supporting the claim of the University.

In this case it is distinctly *held*:

"1st. A gratuitous subscription, to pay certain moneys toward a particular stated fund to be raised for the endowment of certain professorships in a college, become a fixed legal obligation as soon as the college has performed its undertaking and raised the required amount of reliable subscriptions.

"2d. Such subscription to the college to do an act if the college will perform a prescribed duty on its part, if accepted, makes the contract complete."

In *Williams College v. Danforth*, 12 Pick. 541, it is so held more strongly than in *The Farmers' College Case*, if possible; and is the case of a college, and in substance is like the endowment subscriptions for Denison University.

We will cite no more authorities, but will say in conclusion that if the claim of the University was founded upon the original subscriptions, it would be good according to the authorities.

But in this case, the University's claim is well fortified. If there was ever any doubt, that is obviated by the fact that the original subscription was settled, satisfied, and paid by note of \$2,000 ten years ago. Then that note was settled by a new note given on this loan.

The \$500 subscription was also settled by a note being given and entering into this \$7,500 loan.

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After such changes and settlements every presumption is in favor of the transaction, and the court will not go behind it. (See 6 Pick. 431, opinion of Parker, C. J.)

Let a decree be entered for the amount of the money in favor of Denison University.

CHARLES DUWELL v. H. BOHMER.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—APRIL
TERM, 1878.

JURISDICTION IN TRADE MARK CASES.

1. The Circuit Court of the United States has jurisdiction of a suit in equity, to restrain the infringement of a trade mark registered under the act of Congress, of July 8, 1870, (16 Stat. at Large, chap. 230,) irrespective of the residence of the parties to the suit.

2. The fact that both complainant and respondent are citizens of the same State, does not deprive this court of jurisdiction.

3. The act of July 8, 1870, (16 U. S. Stat. at Large, chap. 230,) and of March 3, 1875, (18 Stat. at Large, part 3, chap. 137, sec. 1,) construed with reference to said jurisdiction.

This was a bill in equity filed to restrain the defendant from the alleged infringement of a trade mark, which the complainant claimed to have registered in accordance with the provisions of the act of Congress, of July 8, 1870.

W. S. Bates, for respondent, who demurred to the bill of complaint for the reason that the court had no jurisdiction of the case.

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The grounds taken by respondent in support of the demurrer, were as follows:

The bill shows that both parties are citizens of the city of Cincinnati, State of Ohio.

The question is whether the trade mark statute, title 60, Rev. Stat., chap. 2, p. 963, gives jurisdiction?

The only clause in the statute which it is claimed gives jurisdiction, is section 4942, R. S., which provides that the party aggrieved shall have his remedy in "any court having jurisdiction over the person" guilty of the wrongful use. It is submitted that the words "jurisdiction over the person," do not confer jurisdiction on the Circuit Court.

The Circuit Courts have jurisdiction only where it is expressly given by act of Congress. In cases of doubt the presumption is against their jurisdiction.

See *Turner v. Bank of North America*, (Sup. Ct.,) 1799, 4 Dallas, 8, 1 Peters Cond. 206-7; also *United States v. Hudson and Goodwin*, (Sup. Ct., 1812,) 7 Cranch, 32, 2 Pet. Cond. 405; also, *Hepburn & Dundas v. Ellzey*, (Sup. Ct., 1805,) 2 Cranch, 445-451, 1 Pet. Cond. 441; *New Orleans v. Winter*, (Sup. Ct., 1816,) 1 Wheat. 91, 3 Pet. Cond. 499; *Ex parte Smith*, (Sup. Ct.,) 4 Otto, 455; *Hubbard v. R. R. Co.*, (Vermont, 1853,) 3 Blatch. 84-6; *Lockhart v. Horn*, (Ala., 1871,) 1 Woods, 628; *Karrahoo v. Adams*, (Kan., 1870,) 1 Dill. 344-8; *Harrison v. Hadley*, (E. D. of Ark., 1873,) 2 Dill. 229-233; *United States v. Cultus Joe*, (Wash. Territory,) 15 Int. Rev. Rec., 6 Abbott Nat. Dig. 188, ¶ 13.

From this it appears that the Federal Courts have jurisdiction of the person of a defendant, only in certain cases specifically set forth in the statute. The case at bar is not one of these. Nor is there an act giving the Federal Courts jurisdiction over the subject matter of trade marks.

What then is the object of the section in question?—sec. 4942, R. S.

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By the common law the right of property in the use of a trade mark accrued only after long use. (*McAndrew v. Bassett*, 10 Jur., U. S. 550.)

"By the common law the owner of a trade mark had his remedy, etc., in any court having jurisdiction over the person guilty of the wrongful use." *Derringer v. Plate*, (1865,) 29 Cal. 292; *i. e.*, he might sue an infringer in the courts of the State of which the infringer was a citizen. He might sue in the United States Circuit Court, if he were a citizen of one State and the infringer of another, because in that case the Circuit Court would have jurisdiction over the person.

By section 4942, R. S. the owner of any recorded trade mark has his remedy, etc., in any court having jurisdiction over the person, etc.

The common law gives a remedy for a mark established by use. The statute provides the same remedy for a mark established by registration.

The statute is designed to encourage trade and commerce by facilitating the adoption of trade marks.

This is the view adopted by the Commissioner of Patents. See case of *Dutcher Temple Co.*, Com'r. Dec. 1871, p. 248-9.

The case should therefore be dismissed for want of jurisdiction.

W. H. Fisher, for the complainant, in support of the motion to overrule the demurrer.

Under the organic act of September 24, 1879, sec. 11, patentees and authors had the same footing in the Circuit Courts as other suitors. The limitation as to amount and citizenship was removed from them by the act of February, 15, 1819.

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The patent act of July 4, 1836, ch. 357, (5 Stat. at Large, 117,) and the copyright act of February 3, 1831, ch. 16, (4 Stat. at Large, 436,) each respectively repeal all of said act of 1819 that relates to their respective subjects, and both re-enact the aforesaid provisions of the act of 1819.

The act of July 8, 1870, chap. 230, ss. 55, 106 Rev. Stat., sec. 629, p. 111, provides that the Circuit Courts shall have jurisdiction as follows: "Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States."

In the act of July 8, 1870, (U. S. Stat. at Large, vol. 16, ch. 230, sec. 21 et seq.) to revise, consolidate and amend the statutes relating to patents and copyrights, we find the first mention of trade marks, the place and the mode of registry, the nature of the protection granted them when registered, and the remedies for securing such protection.

The sections relating to trade marks lie between those pertaining to patents and those relating to copyrights, and the sections of the act are numbered consecutively.

The heading and interior construction of this act indicate it to be one act. This act interpreted in connection with the said ninth section of the act, Rev. Stat., sec. 629, p. 111, same year, gives the United States Circuit Court jurisdiction of the present case.

The right of Congress to legislate concerning trade marks is based upon section 8, of article 1, of the Constitution of the United States.

The law of trade marks being a part of the copyright laws, the Circuit Court has jurisdiction. The first section of the act of March 3, 1875, does not repeal the act of 1870, R. S., section 629, page 111, pertaining to the Circuit Courts, as no reference is made in the act of "75" to that of "70;" and only such acts or parts of acts are repealed, as are in conflict with that of "75."

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The jurisdiction given the Circuit Courts by the act of "70," as to cases arising under the patent and copyright laws, is not in conflict with the act of "75."

In the act of "70" there are several sections that relate to cases arising under the laws of the United States, and it may be urged that the words "arising under the laws of the United States" in the act of "75," are intended to take the place of such several sections of the act of "70;" the clause referred not appearing in the earlier judiciary act.

If this fact be admitted it is evident that the act of "75" gives jurisdiction in patent and copyright cases (which is one class of cases arising under United States laws) only where the amount exceeds, exclusive of costs, \$500. Such could not be the intent of this act, as the intendment of legislation has always been to give the Circuit Courts jurisdiction in patent and copyright cases without regard to the amount in controversy.

If this act of "75" is construed in connection with section 4942 of the patent and copyright law of "70" (Vol. 16 U. S. Stat. at Large, p. 200, S. 21, c. 230,) it will be apparent that said S. 4942 does not take away the jurisdiction of the Circuit Courts in patent, trade mark and copyright cases conferred by the act of "75," but does allow the Circuit Court jurisdiction in an equity suit for injunction, etc., to prevent an infringement of a registered trade mark, without regard to the citizenship of the parties or the amount in controversy; the only limitation being that the infringer shall be sued where he can be legally served.

The United States Circuit and Supreme Courts have assumed jurisdiction and rendered decisions in a number of suits brought for infringement for trade marks registered under the said act of July 8, 1870.

The case of *Smith v. Reynolds*, U. S. C. C., S. D. N. Y., is exactly in point, in the present motion, as both com-

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plainants and respondents thereof were citizens of the same State.

Judge BLATCHFORD assumed jurisdiction and delivered an opinion on the question of infringement, O. Gaz. U. S. Pat. Off., Vol. 3, p. 213, et seq. The question of jurisdiction was not raised by counsel.

If the United States Courts have no jurisdiction, cases brought for infringement of trade marks, registered under the act of "70," parties being residents of same State, and amount in controversy not being over \$500, a class of cases exists where no remedy has been provided.

Because it is not clear that the said act confers upon the State Courts jurisdiction of such suits. Hence the registry of his trade mark as provided by said act would afford the complainant no protection.

If the complainant discard the fact of registry, bring his suit in the State Courts, (unless he had acquired a property in the mark by use,) he could obtain no footing there.

By the act of "70" one who invents or appropriates a new trade mark and registers the same is promised protection, irrespective of the question of use of the mark. If he cannot have protection in the United States Courts, he cannot have it anywhere, and the act of 1870 becomes a dead letter.

He has paid the Government a fee of \$25, for registry of his trade mark in consideration of protection.

The Government has received his money and withholds the consideration.

It is respectfully submitted that the demurrer should be overruled.

SWING, J.—The demurrer is that this court has no jurisdiction of the case.

The ground of the demurrer is that the parties are both residents of the State of Ohio, and that there is no act which

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confers upon the United States Courts jurisdiction of the subject matter in such a case.

The act of 1870, Rev. Stat., sec. 629, p. 111, gives the Circuit Court jurisdiction of all suits under the copyright and patent laws.

If the trade mark law is in any fair sense a copyright law, the act gives jurisdiction.

The only provision of the Constitution which in any wise bears on the power of Congress to pass laws respecting trade marks, or to protect them, is the following, viz.: Section 8, of article 1, of the Constitution of the United States. "The Congress shall have power: to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

"Also to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

There is no other clause of the Constitution which vests in Congress the power to grant to authors an exclusive right to their writings, and Congress in legislating on this question undoubtedly drew their power from this section.

The copyright and trade mark laws all come from the same source. So if the trade mark act of 1870 be a copyright law, then the court has jurisdiction without reference to residence or the amount in controversy.

The clause or words in section 4942, of the copyright and trade mark law, viz.: "shall be liable to an action on the case for damages for such wrongful use of such trade mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade mark and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use," does not limit this jurisdiction.

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But there may be a general extending of the right to sue; that is, where there is a general jurisdiction in the courts of the United States you may go into any State Court. This section 4942 may be an enlargement, but is not a limitation of the jurisdiction.

But aside from this act, section 1, chapter 137 of the act of March 3, 1875, provides: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States," etc. The clause granting jurisdiction is without limitation as to residence. It only limits the amount in controversy. The remaining clauses are wholly disjunctive.

The first three clauses are without qualification as to citizenship. Then follows the clause when there shall be controversies of citizens of different States.

In the present case the right is derived exclusively from a law of the United States. In this statute no citizenship is requisite, and if, in this case, it is a suit of a civil nature at common law or in equity, the jurisdiction vests in the Circuit Court, whenever the amount in controversy is over \$500. If the suit arises under the Constitution or a law of the United States, the jurisdiction is then vested without respect to the amount.

The authorities upon the question at issue are very limited, and not a single case, in which the question has been raised, has been cited by counsel.

The point at issue is argued for the first time *de novo*. It has been ably argued.

I have looked into every book and in all reported decisions, and have been unable to find anything in which the question has been determined.

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In Bump's Treatise, Law of Patents, Trade Marks and Copyrights, it seems to be taken for granted that the Circuit Court has jurisdiction.

I find that in the index, under the head of Circuit Courts is "Original jurisdiction in patent cases, page 13," "in copyright cases 13," "in trade mark cases 13," "without regard to citizenship, page 13." And he has classed it there without regard to citizenship. Turn to the pages referred to in the index, and we find a copy of the trade mark act. Turn to page 349—where he speaks of the jurisdiction—he simply copies section 4942 of the act.

When we go back to his index and look under the head of "Trade marks," we find "Remedy in State Courts preserved." See page 250, on which page he quotes section 4945 of the statute of 1870, R. S., chap. 2. Now, if we examine that section, we find that it provides again: "Nothing in this chapter shall prevent, lessen, impeach, or avoid any remedy at law or in equity, which any party aggrieved by any wrongful use of any trade mark might have had if the provisions of this chapter had not been enacted." So it is clear that he regards the jurisdiction which the Circuit Court has additional to that possessed by the State Courts, and that the Circuit Court has jurisdiction without reference to the residence of the parties or the amount in controversy.

When we come to look at the trade mark law (Revised Statutes, Title 60, page 953,) we find that the title thereof is "Patents, Trade Marks and Copyrights." And then follows, "Chapter One, Patents;" "Chapter Two, Trade Marks;" "Chapter Three, Copyrights;" and the sections are numbered continuously from the beginning of chapter one, through chapters two and three.

The demurrer is overruled.

See case of *Leidersdorf v. Flint*, DYER, J., (E. D. of Wisconsin, Nov., 1878,) C. L. J., vol. 7, c. 405, deciding to the contrary, where HARLAN, Ass. J. S. C., concurred, on the hearing, with the district judge. [*Reporter*.

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GEORGE A. HAWLEY vs. JOHN KEPP.

CIRCUIT COURT—WESTERN DISTRICT OF MICHIGAN—APRIL
13, 1878.

ASSUMPSIT—PLEA IN ABATEMENT AND DEMURRER.

1. JURISDICTION—CONSTRUCTION OF ACT OF 1875, AND 11TH SECTION OF JUDICIARY ACT—CITIZENSHIP.—The mere fact that the subject matter of a suit has been transferred for the purpose of giving jurisdiction to this court, will not defeat jurisdiction, provided there has been a *bona fide* sale and transfer by which the transferee becomes the real owner and thereby the party to the suit.

2. GENERAL RULE.—It is a general rule that suit may be maintained in the name of a person who is the holder of a negotiable promissory note, though he has no interest therein, provided it is brought for the benefit and by direction of the real owner.

3. EXCEPTION TO SUCH RULE.—But such rule cannot be applied when the question of jurisdiction is to be determined under the act of Congress in question.

The facts are fully stated in the opinion.

McLaren & Jennings, for plaintiff.

Mr. Hoyt, for defendant.

WITHEY, J.—Suit by plaintiff, a citizen of Illinois, against defendant, a citizen of Michigan, upon three promissory notes executed by Wm. Markus & Co., of Muskegon, in this state, payable to the order of defendant at the same place, and by him endorsed and delivered to Kauffman, who endorsed and delivered them to Ives & Son, of Detroit, and who, it is alleged, endorsed and delivered the notes to plaintiff. Defendant pleaded the general issue, and gave notice of special

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defense. He also interposed a plea in abatement, setting up that all the makers and endorsers of the notes are citizens of Michigan; that Ives & Son, while holders of the notes, brought suit on them in the State court at Detroit against the makers and endorsers, Kauffman and defendant, and obtained judgment for the full sum of the notes with interest.

That after such judgment the suit was discontinued as to defendant Kepp therein, and later an order was obtained by Ives & Son granting them leave to withdraw the notes from the files; and still later they obtained an order vacating the judgment as to all the defendants therein except Kauffman. Thereafter this suit was brought by plaintiff, to whom Ives & Son endorsed and delivered the notes subsequent to the aforesaid proceedings. That plaintiff is not a *bona fide* holder and for a valuable consideration; has no property or interest in said notes or their proceeds, but his name is being used for the sole purpose of enabling Ives & Son to bring suit in this court, who are the real owners of the notes, and for whose interest and behalf this suit is prosecuted. To the plea in abatement a general demurrer has been interposed.

The question is one of proper parties to give this court jurisdiction. Prior to the act of March 3, 1875, defining the jurisdiction of the Circuit Courts of the United States, it was several times held by the Supreme Court that where the assignor of the subject matter of the suit is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name used merely for the purposes of jurisdiction, the suit is then a controversy between the former or real plaintiff and the defendant, notwithstanding the assignment or transfer, and not between the plaintiff in the record and the defendant. *Barney v. Baltimore City*, 6 Wat. 280; *Smith v. Kernochen*, 7 How. 216, and other cases therein cited. If the rule applied before the act of 1875 is to govern, then, under the facts admitted by the demurrer,

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Ives & Son are real plaintiffs, and as they and defendant are citizens of the same State, this court has no jurisdiction. Ives & Son endorsed and delivered the notes after due to plaintiff without consideration, and for the sole purpose of enabling suit to be brought in this court, the interest in the notes and their proceeds remaining in Ives & Son. The law of 1875 retains, in substance, the provision of the 11th section of the judiciary act, that the matter in dispute must exceed the sum or value of \$500, and that the suit must be "between a citizen of the State where it is brought and a citizen of another State." The change in language in the law of 1875 is this: It must be a suit "in which there shall be a controversy between citizens of different States." Under the facts stated in the plea in abatement, it is manifest the controversy is between Ives & Son and defendant, and not between the nominal plaintiff and defendant. But it is said the law of 1875 expressly excepts from the operation of the clause quoted above, "promissory notes negotiable by the law merchant, and bills of exchange." The language is: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover them if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

Is this case within the exception? It would be if the suit was one in which there is a controversy between citizens of different States; that is fundamental. In suits of this nature two things are absolutely necessary to give jurisdiction to this court, no matter what other considerations may be involved: 1. The matter in dispute must exceed five hundred dollars exclusive of costs. 2. The subject matter of the suit must involve a controversy between citizens of different States. One of the things are wanting in this suit, for the

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controversy is really between Ives & Son and defendant, both citizens of Michigan.

The mere fact that the subject matter of a suit has been transferred for the purpose of giving jurisdiction to this court, will not defeat jurisdiction, provided there has been a *bona fide* sale and transfer, by which the transferee becomes the real owner and thereby the party to the suit. 6 Wal. 280. Again, it is a general rule that suit may be maintained in the name of a person who is holder of a negotiable promissory note, though he has no interest therein, provided it is brought for the benefit and by direction of the real owner. 15 Wend. 640; 11 Wend. 27. But such rule cannot be applied when the question of jurisdiction is to be determined under the act of Congress in question.

Demurrer overruled, and judgment on the plea in abatement, dismissing the cause for want of jurisdiction.

Commercial B'k of Commerce v. Green.

COMMERCIAL BANK OF COMMERCE v. GEORGE
GREEN AND OTHERS.

CIRCUIT COURT—NORTHERN DISTRICT OF MICHIGAN—MAY 22,
1878.

PLEA IN ABATEMENT TO JURISDICTION.

FOREIGN CORPORATION—A CITIZEN OF ONE STATE SUED AS DEFENDANT WHO CLAIMS TO BE A CITIZEN OF ANOTHER—SERVICE—JURISDICTION.—Where a foreign citizen (corporation) sued a person in the Circuit Court of the United States, and had service upon him as a citizen of Michigan, when, in fact, it turned out that he was at time of such service a citizen of Illinois: *Held*, that the service was good, and a demurrer to a plea setting up such defense was sustained.

T. J. O'Brien, for plaintiff.

L. M. Keeting, for defendant.

The facts are set out fully by

WITHEY, J.—Plaintiff is a corporation created and doing business in Canada under the laws thereof, and consequently a citizen of such foreign State. The declaration states such facts and avers that defendants are citizens of Michigan. Service was had on defendant Green alone; the other defendants are not necessary parties and have not appeared.

Defendant Green has interposed by way of plea in abatement that he is a citizen of Illinois and not of Michigan, to which plea a demurrer has been filed. The single question is whether it affects the jurisdiction of the court that Green is alleged to be a citizen of Michigan, when, in fact, he is a citizen of Illinois, service having been made within this district where defendant was found.

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We are of opinion that demurrer should be sustained. This court has jurisdiction of suits in which there exists "a controversy between citizens of a State and foreign States, citizens or subjects." Act of March 3, 1875, 18 Stat. 470. Such is this case. But the same act provides that, "no civil suit shall be brought before either of said courts," (circuit or district) "against any person by an original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving process." The facts are, plaintiff is a citizen of the dominion of Canada, defendant a citizen of Illinois, and this is a suit in which there is a controversy between them. So far the case satisfies the provisions of the statute as to jurisdiction. A further fact is that defendant is not an inhabitant of this district, but is found at the time of the service of process within the district, and served, and this satisfies the only other provision of the statute involved in order to give unquestioned jurisdiction. The clear import of the act of Congress is to give to an alien the right to sue a citizen of any State of the Union in the Circuit Court of any district where the defendant is found and served. If such is not the statute, then so long as defendant absents himself from the State of which he is a citizen, he cannot be sued in a Federal Court, whereas it was the clear intention to provide otherwise.

We are aware that it has been held, under the eleventh section of the judiciary act, that it is necessary to state in the declaration of what particular States the respective parties are citizens in order to advise the court of such facts as show jurisdiction. *Hodgson v. Bowerbank*, 5 Cranch, 303; *Wilson v. The City Bank*, 3 Sumn. 422. But in those and other cases, where the language of the court tends to convey the same view, the facts and the question were quite unlike those in the case at bar. The declaration contains the necessary averments as to citizenship of the parties. The plea

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states no fact showing want of jurisdiction, but merely want of accuracy as to the State of which defendant is a citizen. It is quite immaterial that defendant is a citizen of some other State than Michigan, so long as he was found and seized within the district.

Demurrer sustained, with leave to defendant to plead over.

IN RE SAM'L D. JACKSON.

DISTRICT COURT—WESTERN DISTRICT OF MICHIGAN—
MAY 22, 1878.

HABEAS CORPUS.

1. PERSON CHARGED WITH CRIME—DEMAND ON EXECUTIVE AUTHORITY OF ANOTHER STATE.—The Constitution provides that a person charged with crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up.

2. WHAT IS REQUIRED TO BE SHOWN UNDER THIS PROVISION.—Before the executive of a State is authorized to issue his warrant to cause to be arrested and secured a person charged in another State with crime, it should be shown by evidence, making a *prima facie* case, that such person has fled from the demanding State—and this must be done by competent evidence. The fact of fleeing lies at the foundation of the right to issue a warrant of extradition.

3. CERTIFICATE OF DEMANDING GOVERNOR.—The certificate of the governor, demanding such person upon the ground of his having fled from justice, is no evidence of the fact.

4. WHAT IS PROOF.—To prove that such a person has fled from justice so as to enable the governor to have his demand for extradition complied with, it is necessary to present with such demand a copy of an indictment, or an affidavit made before some magistrate charging the person demanded with having committed a crime, and this should be certified as authentic by the governor demanding such person.

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The facts are fully stated in the opinion.

Names of counsel do not appear in the record.

WITHEY, J.—The constitutional provision that “a person charged in any State with crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime,” is supplemented by an act of Congress providing the mode of effecting the extradition. The act of 1793, Revised Statutes, section 5278, provides that “Whenever the executive authority of any State demands a person as a fugitive from justice, of the executive authority of a State to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate, charging the person demanded with having committed a crime, certified as authentic by the governor of the State from whence the person so charged has fled, it shall be the duty of the executive of the State, to which such person has fled to cause him to be arrested and secured, and to cause notice of his arrest to be given to the executive authority of the State making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.”

1. It must appear and be shown that the person has fled from the demanding State and from justice.

2. The person must be demanded by the governor of such other State, as a fugitive from justice.

3. A copy of indictment found, or affidavit, etc., charging the person with crime must be presented and be certified as authentic.

These things being made to appear to the executive of this State, it becomes his duty “to cause the person to be arrested

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and secured, for the purposes of rendition. What was shown to the executive of the State of Michigan upon the application for the warrant of extradition is not before the court.

Jackson has petitioned for a writ of *habeas corpus* upon the alleged ground that he has been arrested and is held in custody in violation of the Constitution and laws of the United States, specifying several causes. Rev. Stat. U. S., sec. 753.

Every citizen deprived of his liberty is entitled, upon petition setting forth a sufficient showing, to the writ in order that the cause of his arrest and detention may be inquired into. To the writ Hollis C. Pinkham, having said Jackson in custody, has made return that he is the agent of the State of Massachusetts, named in the warrant of the executive of Michigan, and to him directed, a copy of which warrant is made part of the return; that by virtue thereof he, as such agent, has said Jackson in custody, and that the true cause of such imprisonment and detention of Jackson is set forth and fully appears in said warrant.

The right to hold the relator depends wholly upon the sufficiency of the warrant of extradition on its face, and nothing else, and with our present views we should not be disposed to look behind the warrant.

The warrant recites proceedings anterior to its issuance, and upon which the executive based his action, with a view to show that *prima facie* the requirements of the act of Congress had been complied with, which made it the duty of the governor to issue his warrant of extradition. Among other things the warrant recites that Pinkham is agent of the State of Massachusetts to receive and remove Jackson, the presentation of an authentic copy of an indictment charging Jackson with crime in that State, and a demand by the governor of that State on the executive of Michigan.

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The warrant does not state that it has been satisfactorily shown to the governor of Michigan that Jackson has fled from the State of Massachusetts or from justice.

What it recites on that subject is that the executive of Massachusetts "has by letters under his hand and made patent by the great seal of the State, represented to me that one Samuel D. Jackson has fled from justice in said State of Massachusetts." Is this sufficient on the face of the warrant to show *prima facie* that Jackson has fled from justice or from Massachusetts?

The Constitution declares that "a person charged with crime, who shall flee from justice and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up."

Now it is manifest that before the executive of Michigan is authorized to issue his warrant to cause to be arrested and secured, a person charged in another State with crime, it should be shown by evidence making a *prima facie* case that such person has fled from the demanding State. This should be shown by competent evidence, as the fact of fleeing lies at the foundation of the right to issue a warrant of extradition. The certificate of the demanding governor is no evidence of the fact. Neither the act of Congress nor any rule of evidence makes his certificate evidence of such fact. The act of Congress makes it the duty of the executive of the State "to which such person has fled" to cause him to be arrested and secured. The mere fact that a citizen of Michigan has been charged with crime and indicted in another State, is not legally sufficient to authorize the arrest and extradition of such citizen. He may be charged with crime, and indicted in a State into which he has never entered or was never in, and from which, therefore, he never fled. It is as essential to the right of arrest and extradition to prove to the satisfaction of the governor of Michigan that the per-

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son charged with crime has fled from justice as to prove that he is charged with a crime in such other State. The latter is sufficiently proved in either of the two methods provided by the law of Congress; by copy of an indictment, or by an affidavit made before some magistrate charging the person demanded with having committed a crime, certified as authentic by the demanding governor. No provision is made as to the method of proving that the person demanded as a fugitive has fled from justice. But when the Constitution says a person charged with crime "*who shall flee from justice*" shall be delivered up, the converse is, that a person charged with crime who shall not have fled from justice shall not be delivered up to be removed. Hence it is essential that it be shown that the accused is a fugitive from justice, and when such person represents by petition to a court that he is unlawfully deprived of his liberty, if the court may act at all, it is a material inquiry whether the governor's warrant is *prima facie* sufficient to justify the arrest and removal.

The evidence that the person has fled from justice must not only be satisfactory to the governor, but must be legally sufficient before the executive authority can be exercised. He cannot act upon rumor nor upon the mere representation of a person, nor upon the demanding Governor's certificate. It should be sworn evidence, such as will authorize a warrant of arrest in any other case.

Had the governor of Michigan stated in his warrant of arrest and removal that it has been satisfactorily shown to him that Jackson had fled from justice, or was a fugitive from justice from Massachusetts, such statement would be *prima facie* sufficient and possibly conclusive. There are judgments which seem well considered, holding the warrant would, if *prima facie* sufficient, be conclusive, and that courts will not go behind it in such cases. But it is manifest if the warrant fails to recite or state any conclusion of

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the executive issuing it, that the person charged has fled, and recites only that the demanding governor has so represented, that the warrant is not legally sufficient to authorize an arrest and extradition. It is a common principle that a process of arrest must be legally sufficient on its face. We are called upon to say whether the warrant of extradition is *prima facie* sufficient under the Constitution and laws of Congress, and we are of opinion that it is not. The question is in principle within the case of *Ex parte Thornton*, 9 Texas, 635. The warrant recited that it had been represented and made known by the demanding governor of Arkansas to the governor of Texas, that Thornton stands charged with the crime of forgery and had fled from justice in the State of Arkansas and taken refuge in the State of Texas; it failed to state that such representation was accompanied by an authenticated copy of an indictment, etc., charging the relator with crime, and for that reason the warrant was held defective and insufficient. That it showed the governor of Texas had acted on the mere representation of the demanding governor. The exact point in the case at bar was not raised, but if such representation by the demanding governor is not sufficient for one purpose it is not as to any other material fact.

The State v. Schlemn, 4 Harrington, 577, has been cited. It was ruled in that case that "the warrant of the executive under the great seal of the State, reciting the facts necessary under the act of Congress to give him jurisdiction of the case, would, at the hearing of the *habeas corpus*, be conclusive evidence of the existence of those facts, of his judgment in relation to them, and of a compliance with the Constitution of the United States and of the act of Congress."

This view has not always been acquiesced in by the courts; but assuming the judgment to be correct, "the facts necessary" to give the executive jurisdiction must be stated or recited in the warrant.

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Several cases have been cited as controlling the case at bar, holding certain things only are essential to be shown to render it the duty of the executive on whom the demand is made to remand, and that inasmuch as evidence that the party has fled from justice is not stated to be one of the essential matters, therefore it is claimed not necessary either to show such fact or to recite in the warrant any conclusion by the executive as to the fact. Those cases were decided on the questions raised therein and are authority only as to those questions.

Courts not unfrequently lay down general rules not necessary to the decision of the case being considered, and which therefore often fail to stand the test when a different question, not anticipated or considered, is presented. The relator must be discharged. We do not suppose his discharge will have the necessary effect to defeat his extradition, if in fact he has fled from justice. Doubtless the executive, upon a renewed application, can reconsider the case and issue a second warrant, for which there is precedent. But certainly unless it is shown that the relator was in Massachusetts at or about the time when the offense is charged to have been committed and has since that time departed that State, there would be no just or legal ground for saying he had fled from justice in Massachusetts.

The State of Massachusetts enacts that no person should be surrendered to the authority of another State unless there is sworn evidence "that the party charged is a fugitive from justice."

In Pennsylvania it is said the practice is to issue the warrant of surrender whenever a requisition is supported by indictment, etc., "and by an affidavit that the defendant has fled from such State into one where the warrant is demanded"—6 Penn. Law Journal, 412; see, also, Hurd on Habeas Corpus, page 606, where it is said "there must be an actual

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fleeing from justice, and of this the governor of the State of whom the demand is made should be satisfied." See, also, *Ex parte Joseph Smith*, 3 McLean, 121.

The importance of adhering to the views expressed could be made apparent by referring to many cases where indictments have been found in one State upon no evidence or upon wholly insufficient evidence, and where the indictment subserved no end of justice. We have in mind an indictment found in a neighboring State against a citizen of Michigan upon wholly insufficient evidence inspired by revenge and black-mailing purposes. It was said a late governor of Michigan inquired into the facts and refused to issue a warrant. We noticed in the papers of an adjoining State, not long since, that one or more indictments had been found by a grand jury without any evidence whatever, on request of a prosecuting officer.

Such cases, considering the facility with which indictments are sometimes obtained, afford sufficient justification not only to the executive of a State on whom a demand for extradition is made, but to the courts to see that the case falls within the laws.

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JONES, ASSIGNEE v. CLIFTON.

CIRCUIT COURT—DISTRICT OF KENTUCKY—JULY, 1878.

SETTLEMENT ON WIFE BY HUSBAND.

1. POWER OF REVOCATION.—If a husband, not contemplating bankruptcy, but wholly free from debt, convey lands to his wife, to her separate use free from his control, the deeds reserving to the husband a power of revocation in whole or in part, and a power of appointment by deed or will to any uses or persons he may designate, and he become bankrupt three years afterwards—such settlement will be upheld against the assignee in bankruptcy.

2. If it be omitted to insert a power of revocation in a voluntary settlement, this will be regarded in a court of equity as a suspicious circumstance.

3. A court of equity will protect a wife in a settlement made by a husband, when free of debt and not thereto induced by fraudulent motive, if it confer any benefit on her. And notwithstanding the deed may not contain every provision that a chancellor might direct to be inserted in a settlement ordered by himself, and, moreover, has in it reservations which impair the full benefit of the provision in favor of the wife, it will be sustained if any substantial benefit is conferred on her so long as she is in the actual enjoyment of the same.

4. SUCH POWERS AS DO NOT PASS UNDER THE BANKRUPT ACT TO THE ASSIGNEE.—Under sections 5044 and 5046 powers of revocation and appointment to be exercised by the bankrupt do not pass to the assignee. Only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights, passes.

The facts are stated in the opinion.

B. H. Bristow and Jas. A. Beattie, for plaintiff.

Bijur & Davis, for defendants.

BALLARD, J.—On the 3d of October, 1872, the defendant, Chas. H. Clifton, being then free from debt, and with a

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fortune probably exceeding two hundred and fifty thousand dollars, conveyed to his wife, without the intervention of a trustee, a small parcel of land, worth about seven hundred dollars, and assigned to her five policies of insurance on his life, each for ten thousand dollars, but at the time not worth more in the aggregate than twelve thousand dollars. On the 1st of April, 1873, being still free from debt, and with his fortune very little diminished, he made another conveyance to his wife, also without the intervention of a trustee, of two parcels of land, one situated in the city of Louisville and the other in the county of Jefferson. The first parcel was, at the time of this conveyance, and still is, incumbered by mortgage to probably its full value. The other parcel was the homestead of the ancestors of the grantor, and was estimated to be worth eighteen thousand dollars. On this parcel he afterwards erected a dwelling-house which cost eight thousand five hundred dollars.

By both deeds, and substantially in the same terms, the property was conveyed "to the said Nannie to hold to her and her heirs forever as her own separate estate, free from the control, use, and benefit of her husband." By both deeds, and substantially in the same terms, power and authority were conferred on the grantee to appoint the parcels of land and each or all of them, or part or parts of each, as often as she might choose to exercise the same, to such uses as she might designate by joint deed with her husband, or by a writing in the form of and to take effect as a devise under the statute of wills of Kentucky; and by both deeds, in substantially the same terms, the grantor expressly reserved to himself power to revoke the grants in whole or in part, and to appoint to any such uses or persons as he might designate either by deed or last will. In default of appointment, or to the extent that the grantor might fail to appoint, each of said parcels of land was to remain to the

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grantee and her heirs forever as her separate estate, with the powers conferred upon her as above stated.

On the 4th of December, 1875, Clifton filed his voluntary petition in bankruptcy, and was adjudged bankrupt thereon, and the complainant, Stephen E. Jones, was appointed his assignee. In October, 1876, the assignee brought this suit in equity, in which he seeks to have both of the above-mentioned deeds declared void, and thus the clouds removed from his alleged title to the parcels of land and policies of insurance mentioned therein.

The bill proceeds on three grounds, all more or less connected, but still so distinct as to require a separate statement: First—That the making of the two instruments was a contrivance and scheme on the part of Chas. H. Clifton to cheat, hinder and defraud his *future* creditors. Second—That the conveyances having been made by the husband to the wife, without the intervention of a trustee, are, because of this, and because of the reservations contained therein, especially the absolute power of revocation, void, and so passed no title or interest to the nominal grantee. Third—That by operation of the bankruptcy act the property described in the instruments, or, at least, the powers of revocation therein reserved, passed to the complainant as assignee in bankruptcy. I shall examine each of these grounds separately.

The complainant has offered no testimony whatever of the alleged fraudulent intent. He does not even allege that the grantor at the time the conveyances were executed owed anything. The uncontroverted proof is that he was then free from debt; that he was not then engaged in trade; that he did not contemplate engaging in trade or contracting debts; that he was an indiscreet young man, who, though possessed of a large fortune, might squander the whole in reckless gaming and dissipation; that the settlements were made at

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the suggestion of his more prudent wife, and did not embrace more than one-sixth of his estate.

That Clifton might, under these circumstances, by *proper conveyances*, have settled on his wife this amount of property, free from all claims proceeding from his future creditors, or from his assignee, is indisputable. The authorities everywhere sustain such settlements. *Seaton v. Wheaton*, 8 Wheat. 229; *Hinde v. Longworth*, 11 Wheat. 211; *Haskell v. Bakewell*, 10 B. Mon. 206; *Lloyd v. Fulton*, 91 U. S. 485; *Smith v. Vodges*, 92 U. S. 183. Authorities to the same point might be multiplied indefinitely.

The learned counsel of complainant themselves do not dispute that such settlements are generally unimpeachable. Their contention is that the settlements in controversy here were not made by *proper conveyances*; that the conveyances being made by the husband to the wife without the intervention of a trustee are void in law, and that by reason of the powers of revocation reserved they are void both in law and in equity.

It thus appears that the complainant does not now ask relief on the ground of the distinct fraud alleged. If he attaches any importance to the allegation of fraud contained in his bill, it is only because he considers that a deed made by a husband to his wife, containing a reservation of an absolute power to revoke it, is *per se* fraudulent. Thus considered, the complainant's first ground becomes blended with the second, and one and the same with it; and I proceed, therefore, to consider the second ground.

Under the common law system the husband and wife are, for most purposes, regarded as one person. As a result of this legal unity, their contracts with each other, whether executory or executed, in parol or under seal, are void. This doctrine, it must be confessed, has little foundation in reason. It is wholly unknown in that enlightened system of juris-

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prudence which, coming down to us from the ancient civilizations, now prevails on the continent of Europe, and it has only a faint recognition in the system of equity jurisprudence which in England and in this country, has grown up by the side of the common law. In equity the husband and wife are for many purposes treated as two persons. Whilst at law all the personal property of the wife becomes on marriage the property of the husband, and the entire management and profits of her real estate pass to him, in equity she may not only own and manage her real and personal estate, but she may dispose of it free from the control of her husband. True, it was at one time doubted whether any interest in either real or personal property could be settled to the exclusive use of a married woman, without the intervention of trustees; but for more than a century and a quarter it has been established in courts of equity that the intervention of trustees is not indispensable, "and that whenever * * * property * * * is settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights of her husband, and of his creditors also." 2 Story's Equity Jurisprudence, Sec. 1380.

Nor is it at all material whether the settlement is made by a stranger or by the husband himself. In either case the trust will attach upon him, and will be enforced in equity. It is now universally held that a settlement made by a husband on his wife by direct conveyance to her, will be enforced in the same manner and under the same circumstances that it will be when made by a stranger, or when made to a trustee for her exclusive use. *Shepard v. Shepard*, 7 Johns. Chy. 56; *Jones v. Obenchain*, 10 Gratt. 259; *Sims v. Rickets*, 35 Ind. 192; *Thompson v. Mills*, 39 Ind. 532; *Putnam*

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v. *Bicknell*, 18 Wis. 335; *Burden v. Amperse*, 14 Mich. 91; *Barron v. Barron*, 24 Vt. 398; *Maraman v. Maraman*, 4 Met. (Ky.) 84; *Wallingford v. Allen*, 10 Pet. 594.

All voluntary conveyances, whether made wholly without consideration or upon the meritorious consideration of love and affection, are scrutinized and regarded with some suspicion in courts of equity, when they are sought to be impeached by creditors. But I have been referred to no case, and I have found none which hints that a reasonable settlement made by a husband, free from debt, on his wife by direct conveyance to her, is any more impeachable than when it is made through the intervention of trustees. Settlements made in either mode, when uncontaminated by actual fraud, are unimpeachable by subsequent creditors.

It may be admitted that a power of revocation, inserted in an assignment made by a debtor for the benefit of his creditors, would render such assignment constructively fraudulent, and therefore void. *Riggs v. Murray*, 2 Johns. Chy. 576; S. C. 15 Johns. 571; *Tarback v. Marbury*, 2 Ver. 510. But such power of revocation has never been held to affect a family settlement. On the contrary, in the above case of *Riggs v. Murray*, Chancellor KENT expressly declares that "family settlements may often require such powers of revocation to meet the ever-varying interests of family connections." Moreover, it is the well-settled practice in England to insert such powers in such settlements, unless, indeed, the sole object of the settlement is to guard against the extravagance and imprudence of the settler. Indeed, ever since Lord Hardwicke's time, the failure of the conveyancer to insert a power of revocation in a deed of family settlement has been regarded as a strong badge of fraud. *Huguenin v. Basely*, 14 Vesey, 273.

In some of the later cases such settlements have been annulled at the suit of the settler, apparently on the sole

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ground that they did not contain a power of revocation. In *Coutts v. Acworth*, L. R. 8 Eq. 558, it was held that "the party taking a benefit under a voluntary settlement * * * containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable." In *Wollaston v. Tribe*, L. R. 9 Eq. 44, the same rule is recognized and enforced. In *Everett v. Everett*, L. R. 10 Eq. 405, the Chancellor in annulling a deed of settlement made by a young woman soon after she arrived at age, chiefly on the ground that it contained no power of revocation, says, in substance: "The sole object of the settlement being to protect the settler and her children, if she married, had I been called on for advice, I should have said: 'Have proper trustees, give her a voice in the selection of new trustees, and give her a power of revocation with the consent of the trustees.'"

In *Phillips v. Mullings*, L. R. 7 Ch. App. 244, the court of appeal recognizes the same general rule, but in that case refuse to annul the settlement, though it contained no power of revocation, on the distinct ground that the settlement was made by a young man of improvident habits to guard against his own folly, and "the deed was explained to him and the particular clauses brought to his notice." "Those who induce," said the Lord Chancellor, "a young man of this description to execute such a deed, are bound to show that the deed is in all respects proper, or, if the deed contains anything out of the way, that he understood and approved it. * * * It is not necessary to show that the usual clauses inserted by conveyancers were explained, but any unusual clauses must be shown to have been brought to his notice, explained and understood." In *Hall v. Hall*, L. R. 14 Eq. 365, the vice-chancellor regarded the rule as so firmly settled that he felt impelled to annul a settlement twenty years after

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its execution, simply because it did not contain a power of revocation. The same rule has been recognized and adopted in the United States. *Russell's Appeal*, 75 Penn. St. 269; *Garnsey v. Mundy*, 24 N. J. Eq. 243. Some chancellor has intimated that a voluntary settlement partakes very much of the nature of a last will, and that it should be scarcely less revocable.

I feel much difficulty in yielding assent to the extreme doctrine announced in some of these cases, and I am glad to observe that it is somewhat modified and limited by the late case of *Hall v. Hall*, decided by the Court of Appeal in chancery in 1873, L. R. 8 Chy. Ap. 430. I quite agree with what Sir W. M. JAMES, L. J., says in this case: "The law of this land permits any one to dispose of his property gratuitously if he pleases, subject only to the special provision as to subsequent purchasers and as to creditors. The law of this land permits any one to select his own attorney to advise him, and it seems very difficult to understand how this court could acquire jurisdiction to prescribe any rule that a voluntary conveyance, executed by a person of sound mind, free from any fraud or undue influence of any kind, and with sufficient knowledge of its purport and effect, should be void, because the attorney of his own selection did not advise him to insert a power of revocation, or did not take his express direction as to the insertion or omission of such power." The true rule is that laid down by Lord Justice TURNER, (3 D. J. and S. 487, 491,) that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the circumstances of each case.

In the case now before me I think it could not be seriously contended that, had powers of revocation been omitted from the conveyances made by Clifton, this fact would have been entitled to much, if any, consideration, in a suit brought by

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him to annul the settlements. To such a suit the chancellor might have said, as Chancellor HATHERLY did in *Phillips v. Mullings*: "You were an exceedingly indiscreet and improvident young man. You made the settlements to guard against your own folly and extravagance. Of what advantage would it have been to place the money in this way, out of your control, and then give you power to destroy the limitations whenever you pleased."

But, whatever may be the true doctrine, all of the foregoing cases, and many more that might be cited, certainly do establish that it is ordinarily proper to insert a power of revocation in a voluntary settlement; nay, more, that the omission of such a power will subject the settlement to more or less suspicion. Certainly the practice in England for centuries has been to insert such a power in family settlements.

A practice which is thus approved by time, and which has received the sanction and encomium of courts of equity in both England and America, cannot be regarded as vicious or immoral. Should I hold that these settlements of Clifton are fraudulent and void as to his subsequent creditors simply because they contain powers of revocation, I should overturn an ancient practice and a long line of decisions; nay, I should hold that courts of equity have themselves advised frauds to be committed.

The fact that Clifton inserted powers of revocation in his settlements, so far from proving that he contemplated defrauding his future creditors, tends to show the contrary. Should he simply revoke the settlements, then, of course, the property conveyed would revert to him, and be liable at law for all his debts. And should he exercise the power of appointment for even the benefit of a stranger, then, according to an unbroken current of authority, the whole estate appointed would be liable in equity to his debts. *Thompson v. Towne*, 2 Vern. 319; *In re Davie's Trusts*, L. R. 13 Eq.

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163; *Williams v. Lomas*, 16 Beavan, 1; *Petre v. Petre*, 14 Beav. 197. If, then, he had meditated a fraud he would have omitted the power altogether. He would have relied altogether on the affection and beneficence of his wife to provide for him. To contend that he intended to defraud his creditors, and at the same time to exercise the power of revocation arbitrarily, is to maintain a contradiction, since, as we have seen, the exercise of the power would, *ipso facto*, render the property liable in equity for his debts, unless, indeed, we can assume that he was gifted with a foresight which none of the facts warrant. A man, it is true, might make a voluntary settlement on his wife, and, contemplating that he might be adjudged a bankrupt in the future and be discharged from his debts, reserve a power of revocation for the very purpose of reinvesting himself in such contingency with the property, relying upon holding it free from debts contracted before bankruptcy. It is by no means certain that such a reliance would be safe. It is by no means certain that such a device would not be pronounced a fraud on the bankruptcy act. But assuming that it would not be fraudulent, there is nothing in the present case to suggest that the grantor had any such forethought or was actuated by any such motive. At the time of the settlements he was not only free from debt, but possessed of a large estate. He was not engaged in trade, and all the testimony shows that nothing was farther from his contemplation than bankruptcy. That he did in fact become bankrupt in the short space of two years is partly explained by the large shrinkage in the value of real property, and the decrease in its rents, but it is best accounted for by his frank confession that he has squandered much in reckless dissipation and gaming.

I do not mean to intimate that Clifton, having regard to the motive and circumstances which prompted these settlements, should not have reserved a power of revocation. Had

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he known his own habits as well as his acquaintances knew them, and had his motive been solely to guard against his follies, it would have been more consistent with that motive to deprive himself of all dominion over the estate settled. But he could not know himself as others knew him, and he doubtless had implicit faith that, even should misfortune overtake him, his affection for his wife would be a sufficient guaranty that he could not be persuaded to strip her of his bounty.

The settlements being of his own pure bounty, he might well wish to reserve to himself power to modify the limitations of them according to the future necessities and exigencies of his family. Then, too, the grantor has given reasonable explanation of the particular reservations contained in these deeds. He says that, at the time they were made, he contemplated removing to California, and that his object in reserving the powers of revocation was that he might change the investments from Kentucky to California. He did not expect to exercise the powers for his own benefit; he did not know that he could do so. He only contemplated settlements in California to the same uses declared in the original conveyances.

This suggestion derives additional force from the uncertainty in which the law of Kentucky stood at the time the conveyances were made in respect to the power of a married woman over her separate estate.

The Revised Statutes adopted in 1852 had, in effect, destroyed separate estates. They had, in effect, provided that where real or personal property should be conveyed or devised to the separate use of a married woman she should not alienate the same by joining her husband in an ordinary conveyance or in the exercise of a power, except when the estate was a gift, and then it might be conveyed by the consent of the donor, or his personal representative.

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This provision was so anomalous that it gave much perplexity to the legal profession and produced much litigation. It was frequently amended, but, even down to the date of the settlements in question, its precise meaning and operation were not determined. So uncertain was its construction that timid lawyers might have been found who would not have advised the acceptance of a conveyance from husband and wife of an estate conveyed by the husband to the separate use of the wife. At any rate, Clifton might well have thought it best to guard against the uncertainty by reserving to himself a power which would avoid all difficulty.

Every grantor in England has, by virtue of the second section of the statute of 27 Elizabeth, the substantial right to revoke and annul his voluntary conveyance, since such conveyance is declared by said statute to be fraudulent as to subsequent purchasers for value, with or without notice. *Dolphin v. Aylward*, L. R. 4 Eng. and Irish Appeals, 486; Roberts on Conveyances, 39, 40 and 41. A grantor may, therefore, revoke or annul his voluntary conveyance at any time by conveying the property included in such conveyance to a purchaser for value. But the statute is limited in its remedial operation to purchasers, and, consequently, such settlements cannot be defeated by subsequent creditors. *Dolphin v. Aylward*, *supra*. So, also, the fifth section of the same statute, which makes all conveyances containing powers of revocation fraudulent and void as to subsequent purchasers, does not extend to creditors. Voluntary settlements, whether they do or do not contain powers of revocation, cannot be assailed by creditors unless they are fraudulent. They are revocable by the grantor either by virtue of the express power reserved or by virtue of a subsequent conveyance for value, but it has never been held that they are on this account fraudulent as to creditors.

But, say complainant's counsel, Mrs. Clifton's title is but

the "ghost of a title;" that the legal title is or was in her husband, who reserved to himself absolute power to revoke or to appoint to new uses, and that, therefore, it is not such a title as a court of equity will uphold.

I know it is sometimes said that a court of equity will not enforce every deed made by a husband to his wife. Bishop on the Law of Married Women, section 717. The cases usually cited to support this view are *Beard v. Beard*, 3 Atk. 71; *Moyse v. Gyles*, 2 Vern. 385; *Stoit v. Ayloff*, 1 Ch. Rep. 33. Of all these cases it may be said that they were decided at a time when the rights of married women were not so fully acknowledged or so zealously protected by courts of equity as they are at the present day. It is also to be observed that in the first case the gift was so extravagant as to excite just suspicion of fraud and undue influence. In the second the court refused to aid the defective grant on the ground that it was without consideration. In the third the contract was executory. None of these cases would at all impeach a grant containing no more than a fair provision for the wife, and if they would, they are opposed to the cases heretofore cited in this opinion, to the well-settled doctrine of the Supreme Court of the United States, and to the whole current of later authority.

When the settlement is made by a husband, free from debt, when it is induced by no fraudulent motive, when it makes no more than a reasonable provision for the wife, when it confers *any* benefit on her, I can conceive of no reason why a court of equity should decline to uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confers any substantial benefit on the woman, so long

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as she is in the actual enjoyment of that benefit, a court of equity should and will protect her.

Again, complainant's counsel, whilst they admit that a husband may, by direct conveyance to his wife, make a provision for her which will be enforced in equity; whilst they substantially admit that the provision made by Clifton for his wife was reasonable; whilst they admit that the grants made by him are not void, simply because of the powers reserved in them, yet they somehow insist that all these things combined vitiate the deeds. Their contention is that, as the legal title remained in the husband, notwithstanding the alleged conveyances, and that as this legal title is coupled with absolute dominion over the property, as a legal consequence of the reserved powers, the whole right and property remained in the husband, and passed on his bankruptcy to his assignee. But if, as we have seen, the husband may make a conveyance to his wife which will be upheld in equity; if, as we have also seen, the reservation of a power of revocation or of new appointment does not render such settlement void, it is impossible to conceive that the union of the two particulars in the same instrument would destroy it. It is inconceivable that the mere union of two objections, each of which is a phantom, can render the compound substantial.

It must not be overlooked that complainant himself has appealed to a court of equity. In this court Mrs. Clifton's title is as complete as if she had been a *feme sole* when the conveyances were made to her. The husband's right and interest are not recognized in this court. Every argument, therefore, which is founded on the notion that any substantial title or interest remains in him can have no force in this forum.

The last proposition of complainant's counsel is that by operation of the bankruptcy act the property embraced in

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these settlements, or at least the powers therein reserved, which might be exercised by the grantor for his own benefit, passed to his assignee in bankruptcy.

We have seen that the title which the bankrupt at the time of his bankruptcy held in the property claimed was held in trust for his wife. Now, by the express terms of the statute, property so held does not pass to the assignee in bankruptcy. Section 5053 of the Revised Statutes provides that "no property held in trust by the bankrupt shall pass by the assignment."

To ascertain what property does pass to the assignee in bankruptcy, reference must be had to sections 5044 and 5046. The first of these sections provides that "as soon as the assignee shall be appointed and qualified, the judge or * * * register shall * * * assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee." The second provides that "all property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patent rights and copy-rights, all debts due him, or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention or injury to the property of the bankrupt; and all his rights of redeeming such property or estate, together with the right, title, power and authority to use, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudica-

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tion of bankruptcy and the appointment of his assignee, * * * be at once vested in such assignee."

It will be perceived that powers of revocation and powers of appointment, though they be such as may be exercised by the bankrupt for his own benefit, are not enumerated among the things which pass to the assignee either by virtue of the assignment or of the adjudication in bankruptcy. The "power" which is enumerated and does pass, is only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights which do pass.

A power is not property or an estate. A power to convey or appoint property may be lodged in one having no interest whatever in the property over which the power is to be exercised, or in one having an estate or interest in it. But in either case the power is distinct from the estate. It may be that a grant of property to A., to dispose of it as he should please, would invest him with a complete title; but a grant to A. for life, with remainder to such persons as he should by deed or will appoint, will not give him the absolute interest, although he might acquire it by the exercise of the power. 1 Sugden on Powers, 120; *Maundrell v. Maundrell*, 10 Vesey, 246; *Reed v. Shergold*, 10 Vesey, 371; *Burleigh v. Clough*, 52 N. H. 272; *Collins v. Carlisle's Heirs*, 7 B. Mon. 13; *McGaughey's Adm'r v. Henry*, 15 B. Mon. 383. So a conveyance by A. to B. and his heirs in trust for A. for life, remainder to such persons or uses as A. should appoint, and in default of appointment in trust for C. and his heirs, would leave or vest in A. a life estate only. Or, if A. should convey to B. in trust for himself for life, reserving to himself an absolute power of revocation, still A. would have only a life estate in the property limited. The power of revocation reserved would neither render the conveyance void nor have the effect of enlarging his estate. The learned judges who decided the case of *Willard v. Ware*, 10 Allen, 263, cer-

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tainly so understood the rule, else they need not have troubled themselves with the perplexing question presented in that case, whether the power of appointment reserved in the deed, which was there the subject of consideration, had been actually exercised.

The bankruptcy statute of 13 Eliz. "enables the commissioners to dispose of any estate for such use, right or title as such offender (bankrupt) then shall have in the same which he may lawfully depart withal." And the statute of 21 James I. directs bankrupt laws to be expounded most favorably for the relief of creditors. I quite agree with Sir Edward Sugden when he says that "as a power is a mere right" to declare the trust of an estate upon which declaration the statute of uses immediately operates, and, as it is therefore clearly a use, interest or right which the bankrupt "may lawfully depart withal," there is considerable ground to contend that the bargain and sale of the commissioner should have the same operation as the execution of the power by the bankrupt whilst solvent would have had; but such was never in fact the construction of these statutes. In *Townshend v. Windham*, 2 Vesey, Sr. 3, and in *Thorpe v. Goodall*, 17 Vesey, 338, Lord KING is said to have held that in the case of a tenant for life, with power to charge £100, the power was not such an interest as would pass to the assignees.

Holmes v. Coghill, 7 Ves. 498, was thus: Sir John Coghill, under a settlement made by himself in 1757, reserved the power to himself to charge the estate, situate in certain counties, with any sum not exceeding £2,000. Sir John was also entitled to other estates, remainder in tail to his oldest son. The son arrived of age in 1787, and thereafter he and the father suffered a recovery, and then made a settlement. This settlement embraced all or some of the property mentioned in the settlement of 1757. It not only expressly extinguished the power reserved in the settlement of 1757,

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but directed the trustees to raise such sum, not exceeding £2,000, as Sir John should direct, and pay the same to him or his assigns; or, if the same should not be raised and paid over in his lifetime, then upon trust to raise the same at such time and pay the same to such person as Sir John should appoint. By his will, dated in 1775, and therefore before this settlement, Sir John gave the sum of £2,000, to be raised under the power, to be applied to the payment of his debts. There was a codicil to this will which bore date subsequent to the settlement of 1787, but it took no notice of this power. The bill was filed by creditors. *Held*, by the Master of the Rolls, Sir Wm. Grant—First: That the power reserved in the original deed of 1757 was discharged by the deed of 1787. Second: The will refers only to the power reserved in the deed of 1757, and consequently it is no execution of the power reserved in the deed of 1787. Third: There is an evident difference between a power and an absolute right of property. Fourth: Equity will aid the defective execution of a power, but it cannot itself execute a power. The case was affirmed on appeal, 12 Ves. 206. On the appeal it was urged that there is a difference between an estate to be created under a power which must be limited to a third person and one which may be limited to the donor himself. It was conceded that in the first case the power must be asserted, but in the latter it was strongly insisted that, as the donor had the same power over the estate which he had over his own estate, it should, in equity at least, be equally subject to his debts. But the court rejected the distinction, remarking: "If the argument in support of this appeal prevails, there must be an end of the distinction between the non-execution and the defective execution of a power."

In *Thorpe v. Goodall*, 17 Ves. 388; S. C. 17 Ves. 460, one who had been adjudged a bankrupt was seized for life of

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a certain estate, with a general power of appointment, with remainder in default of appointment to the heirs of his body. The suit was by his assignee to compel him to execute the power. *Held*, by Lord ELDON that equity cannot compel the execution of the power. The learned chancellor, it is true, says that the question whether the power passed, by operation of law, to the assignee was not before him, but he refers to the opinion imputed to Lord KING in such terms as to show that he approves it. Sir Edward Sugden says, in his work on Powers, vol. 1, p. 225, that upon a bill filed by the assignees against the purchaser in this same case, the vice-chancellor was of opinion that the power did not pass to the assignee. He cites *Thorp v. Frere*, (N. C., M. T. 1819,) but I have not been able to find the case reported.

These decisions doubtless led to the enactment of 6th Geo. IV., 16, 5, 77. This statute provides that "all powers vested in any bankrupt, which may be legally executed for his own benefit (except the right of nomination to any vacant ecclesiastical benefice,) may be executed by the assignees for the benefit of creditors in such manner as the bankrupt might have executed the same." A provision substantially the same has, I believe, been incorporated into every bankrupt act which has been passed in England since the date of the above statute, but no similar provision is to be found in our statute, and I must conclude that it was omitted *ex industria*. It certainly cannot be inferred that the draftsman of our statute was unfamiliar with this provision. It may be found in both of the English bankrupt acts of 1861 and 1869. And we know that many of the provisions in our original and amended acts were copied from these statutes.

But whether it was omitted intentionally or not may not be material. Our statute certainly contains no such provision, and it is impossible to construe it as passing to the assignee

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anything which the English statutes enacted prior to 6 Geo. IV. were held not to pass.

As the power reserved by the son in his settlements might be exercised for his own benefit, it is clear that if he was a bankrupt in England his assignee, in virtue of the recent statutes there, might exercise the power for the benefit of his creditors; but as we have no such statute here; as a power is neither real nor personal property, nor an estate of any kind, it is equally clear that this power did not pass to his assignee.

I have no doubt that, in respect to the property which does pass under our statute to the assignee, all the power and dominion which the bankrupt had over it before his bankruptcy likewise passes. Nor have I any doubt that the bankrupt, in virtue of the general provisions of the statute, as well as in virtue of the express terms of section 5050, may be required to execute any instruments, deeds and writings which may be proper to enable the assignee to possess himself fully of the assets; but it is only in respect to the assets of the bankrupt which have passed to the assignee that he can be required to execute any instruments, deeds or writings. He cannot be required to execute a mere power, since a power is not assets or property, or embraced among the things and rights which the statute declares shall pass to the assignee.

But, complainant's counsel insist that the justices of the Supreme Court have given construction to our statute to the effect that it does embrace powers to dispose of or charge property. In proof of this they refer to schedule B, which forms part of every bankrupt's petition, and which schedule was prescribed by the justices under authority of law (section 4490.)

It is true that the caption of schedule B implies that the petitioner shall include therein "property in reversion, remainder or expectancy, including property held in trust for

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the petitioner, or subject to any power or right to dispose of or charge." It is also true that the directions in the body of that schedule seem to contemplate that the petitioner shall *mention* all "rights and powers wherein I (he,) or any other person or persons in trust for me (him,) or for my (his) benefit have any power to dispose of, charge or exercise."

No one more readily than I would submit to a decision of the Supreme Court; but I cannot regard this schedule, though nominally prescribed by its justices, as a decision of the court. The judges cannot in this way give an authoritative construction to the statutes.

Besides, the schedule does not purport to be a construction of the statute, nor does it necessarily imply that all the rights enumerated in it will pass to the assignee in bankruptcy. It is true it would seem idle to insert in the schedule anything in which the assignee could have no interest, but the petitioner cannot be allowed to judge whether or not a given right or interest will pass to his assignee, and to include or exclude it from his schedule at pleasure. His assignee should be fully informed respecting his estate. He is entitled to have, and should have, all the information which the bankrupt himself has.

This may suggest some explanation of the requisitions contemplated by the form prescribed in the schedule. Certainly the form, in terms, contemplates that the schedule shall include a mere naked power to dispose of or charge property in which the bankrupt never had any interest, and which he could not dispose of or charge for his own benefit. Surely no one would be so bold as to contend that such a power passes in bankruptcy; yet, in my opinion, in view of the decisions in England before referred to, construing bankruptcy acts containing more comprehensive terms than ours; in view of the legislation there declaring that powers which a bankrupt may exercise for his own benefit shall pass to his

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assignee in bankruptcy, in view of the terms of our statute and its omissions, there is scarcely more ground for the contention that a power which may be exercised by the donee for his own benefit passes to the assignee, either in virtue of the assignment to him or of the adjudication in bankruptcy, than a power which must be exercised by the donee for the benefit of a stranger.

Let an order be entered dismissing the bill with costs.

This decision has been affirmed by the Supreme Court. 101 U. S. R. 225. [*Reporter*.]

IN THE MATTER OF R. H. CRITTENDEN,
MARSHAL.

CIRCUIT COURT—DISTRICT OF KENTUCKY—JULY 10, 1878.

MARSHAL'S FEES

1. CONSTRUCTION OF REVISED STATUTE, SECTION 829.—"Travel" or "mileage" is to be computed from the place where the process is returned to the place of service.

2. DEFINITION OF WORD "RETURN."—The very term "return" implies that the process is taken back to the place whence it issued.

3. COMMISSIONER'S POWER.—The commissioner has no power to direct the warrant to be returned before another commissioner.

4. MARSHAL—BAILIFF.—The marshal may appoint a bailiff and authorize him to perform a particular act or duty. He then becomes a special deputy.

5. FEES OF MARSHAL FOR ATTENDING EXAMINATIONS, BRINGING IN, ETC.—Section 829, Revised Statutes, allows the marshal, for attending examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crimes, two dollars a day, and for each deputy, not exceeding two, necessarily attending, two dollars a day.

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6. **SAME—MARSHAL'S FEES.**—Where the marshal serves warrants on different parties at same place, he may demand mileage in each case. The only limitation is where there are more than two warrants served in favor of the same parties against the same defendants.

7. **ACTUAL TRAVELING EXPENSES.**—The expenses allowed for "traveling" must be actually proven by the marshal, deputy or bailiff who incurred the expenses, and should be referred to specifically.

8. **COSTS OF TRANSPORTING GUARDS.**—The costs of transporting a guard should be allowed only where it is shown that he is necessary, and, if practicable, the certificate of the commissioner before whom the prisoner was taken, should accompany the affidavit.

9. **COSTS OF TRANSPORTATION OF GUARDS ALLOWED, EVEN WHEN WITNESSES.**—The marshal should be allowed for transportation of guards, even if such guards be summoned as witnesses and be paid for mileage.

10. **WRONG PERSON ARRESTED.**—Where the wrong person is arrested the marshal can be allowed no fees of any kind.

11. **WRONG DESCRIPTION OF PERSON'S CHRISTIAN NAME.**—Where the Christian name of the person arrested is wrongly given by the person making the affidavit and accompanying the officer who makes the arrest, transportation fees should, nevertheless, be allowed.

12. **ARREST IN THE WRONG STATE.**—Where the marshal, acting in good faith, arrests a person in Tennessee, believing at the time that the place of arrest is within the State of Kentucky, no fees can be allowed for such illegal arrest.

13. **CHARGE FOR TIME EMPLOYED IN ENDEAVORING TO ARREST.**—Where the deputy marshal demands compensation for eight days' service in, as he alleges, endeavoring to arrest through a special bailiff, and the same is not supported by proof of such last-named officer, it must be refused. The bailiff should also explain in his affidavit when charges are made for more days than are absolutely necessary, why he was so employed, and why the arrest was not made sooner. Only two days are allowed in such cases, in the absence of the regular proof.

14. **NOT TRAVELING BY USUAL ROUTE.**—Where the marshal, in transporting a prisoner, does not travel by the usual route, he should be allowed mileage only for the route usually traveled.

15. **THE STATUTES OF 1853 AND 1875 REVIEWED.**—Notwithstanding the statutes of 1853 and 1875, section 829 of Revised Statutes will be adhered to as the true rule governing the computation of mileage.

16. **DUTIES OF MARSHAL.**—As to misconduct of deputies, observed upon.

The facts are fully detailed in each case.

BALLARD, J.—In the case of the *United States v. Lan-*

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drum, the warrant was issued at Louisville by a commissioner there, and it came to the hands of the marshal there. It directed the arrest of Landrum and the return of the warrant before another commissioner at London, in this State.

It is not disputed that the marshal actually traveled to execute the warrant, the number of miles charged in this account, and it is not questioned that had the warrant been returned before the commissioner who issued it, the mileage charged would not be excessive; but it is insisted that "travel" or "mileage" is, by the terms of section 829 of the Revised Statutes, to be computed "from the place where the process is returned to the place of service;" that, as the prisoner was arrested near London and taken by command of the warrant before the commissioner in London, the warrant was, in contemplation of law, "returned" to him, and that the marshal can charge for going to serve the warrant for travel of only ten miles, this being the distance from the place where, under this view, the process was "returned" to the place of service.

If the provisions of section 7 of the act of February 22, 1875, apply to this case, it is clear that the charge of the marshal is not excessive. He asks no allowance for travel in going to serve the warrant, which was not actually and necessarily performed. But, as I am strongly inclined to think that the act of 1875 does not alter the mode of computing the mileage of marshals on process executed within the judicial district in which such process is issued, I proceed to consider the question as if it depended entirely on the proper construction of section 829.

I am of the opinion that the commissioner in Louisville had no authority to make the warrant issued by him returnable before the commissioner in London, or before any other commissioner than himself. If it is conceded that he might direct the marshal to take the person before any other com-

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missioner for examination, I suppose the process should be finally returned to himself. Every process which is issued by a court must be returned, unless some special statute otherwise provides, to the court which issues it. This is essential in order, first, that the court may know that its order has been obeyed; and, second, that the records of the court may be complete.

The very term "return" implies that the process is taken back to the place whence it is issued. A thing delivered by one person to another is not "returned" when it is delivered to a stranger, and at a place other than the place of original delivery.

I am of the opinion, therefore, that, in contemplation of the statutes, every process is to be returned to the court or commissioner which issued it, and that for the purpose of computing the mileage of the marshal, the place of return is the place of issue.

Any other construction would enable commissioners to enlarge or lessen the fees of marshals at pleasure, and thus defeat the policy of the statute. Unquestionably the statute intends, as far as practicable, to furnish fixed rules for ascertaining the fees of marshals. Hence it has declared that his "travel, in going * * * to serve any process * * * shall be not the actual distance traveled, but the distance from one fixed point to another fixed point; that is, the distance from the place of service to the place whence the process was issued, or, which is the same thing, the place of return. But, if the commissioner can direct the warrant to be returned before another commissioner, he may direct it to be returned before a commissioner most remote from the "place of service," and thus make the marshal's fees for mileage ten or more times as much as they would be if the process were returnable before himself; if, indeed, for the purpose of computing mileage, we are not confined to the

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distance from the "place of service" to the place whence the process issued—that is, unless we regard the place of issue and place of return of process as one and the same place.

I am of the opinion, therefore, that the objection taken by the attorney to the charge of the marshal in the case of Landrum, and in other similar cases, is not well taken.

The second exception raises the question whether the marshal can charge a fee for attending, by a "special bailiff, examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime," etc. I am of the opinion that he may.

I have heretofore decided in case of *Ex parte Roberts*, 2 Abbott's Circuit Court Reports, 265, that a marshal may appoint a bailiff, and authorize him to perform a particular act or duty. When the bailiff is appointed and engaged in the performance of the act authorized he is the deputy of the marshal; not the general deputy, it is true, but the special deputy. He is deputed by the marshal to do a particular thing, and is, therefore, in fact, as well as in law, his deputy.

Section 829 of the Revised Statutes allows the marshal "for attending examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime, two dollars a day, and for each *deputy*, not exceeding two, necessarily attending, two dollars a day."

Third—It is objected that the marshal has charged mileage for going to execute a warrant in the case of the *United States v. Tolbee*, and also a warrant in the case of the *United States v. Sally*, although both warrants were placed in his hands at the same time, and although both of the defendants reside at the same place, and were in fact arrested there.

I am of the opinion that the objection is not well taken. Section 829 allows the marshal for "travel in going to serve *any warrant* * * * six cents a mile, to be computed," etc. If this were all of the statute, it would be obvious

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enough that he is entitled to mileage on each and every warrant which is served, but the remainder of the section limits the charge when more than two writs of any kind, required to be served in behalf of the same party on the same person, might be served at the same time. In such case the marshal is entitled to compensation for travel on only two of such writs. If the meaning of the former part of the section were at all doubtful, this limitation, by the plainest implication, gives him compensation for travel in going to serve any number of writs, provided they are in behalf of different plaintiffs or against different defendants. Here the warrants, although in behalf of the same plaintiffs, are against different defendants. Nor do I think that the provisions of section 7 of the act of 1875 affects the claim. I have already intimated that I am inclined to the opinion that the fees of the marshal for serving process issued in his own district are not modified by the act of 1875; but conceding that it does in some respects modify them, I am clear it does not exclude a charge for travel in going at the same time to serve two or more writs in behalf of different plaintiffs or against different defendants. The provision is that "No such officer shall * * * become entitled to any allowance for mileage or travel not actually and necessarily performed, under the provisions of the existing law." In my opinion this provision was intended to cut off *constructive* mileage only—that is, mileage allowed by section 829, to marshals, on writs coming into their hands from districts other than their own; but if it applies to writs issued and served in the same district, it changes only the mode of computing mileage. Certainly the marshal does actually and necessarily travel to serve every process placed in his hands; and, if he does so travel, he is, by the terms of section 829, and by implication of the act of 1875, entitled to charge for travel in going to serve each process to be computed by the miles actually traveled, or the

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distance from the place of service to the place of return, according as the act of 1875 or section 829 shall be held to furnish the rule. There is nothing in the act of 1875 to indicate that it was intended to take away from the marshal allowance for travel actually performed to which he was entitled under existing laws. This will, I think, be made plain by bringing together the provisions of the original and amendatory law.

The original act provides that the marshal shall be allowed,

“For travel, in going only, to serve any process * * * six cents a mile, to be computed from the place where the process is returned to the place of service. * * * But, when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation on only two of such writs.”

The amendatory act provides that “from and after the first day of January, 1875, no such officer * * * shall become entitled to any allowance for mileage or travel not actually and necessarily performed.”

The last act does not in terms repeal the first, and consequently it can not be held to repeal it, except so far as the provisions of the two acts are inconsistent. Now, under the first act, as a consequence of the rule there presented for computing “travel,” the marshal was occasionally entitled to an allowance for travel not actually performed. For example, when process was sent to him from a district other than his own he was entitled to mileage to be computed not from the place where the process was received to the place of service, but from the place of service to the place of return. It was to remedy this that the amendatory act was passed. The object was to limit the allowance for travel to the miles actually traveled and not to modify the compensation for travel actually performed. The amendatory act leaves wholly unre-

pealed and unaffected so much of the former act as gives the marshal mileage on all process which he necessarily and actually travels to execute and which he does execute, and which are issued on behalf of different plaintiffs or different defendants.

There are several items of charge in the bill of the marshal for "actual traveling expenses."

Section 829 of the Revised Statutes provides that "in all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath to the satisfaction of the court."

None of these items are proved by the oath of the marshal himself, and many of them are not proven by the oath of the bailiff who incurred the expenses. They are simply verified by the general affidavit of the deputy, in whose account they are included, to the effect that his account is correct. This proof is not satisfactory to the court. My construction of the statute is that all charges for actual traveling expenses must be proven by the oath of the marshal, deputy or bailiff who incurs such alleged expenses, and who alone can know of or be heard of to testify of them, and that no deputy can be heard to testify in respect to expenses incurred by another deputy or bailiff of which he knows nothing. I am also of opinion that if these expenses can be proven otherwise than by oath in open court; if they can be proven by affidavit, the affidavit should be specific, referring to the charges particularly, and, when practicable, the proper vouchers should accompany the proof.

All items in the account not supported by this proof must be stricken out, and in lieu thereof the marshal may charge mileage.

In the account of W. M. Adair, there is a charge for transporting three prisoners, Mark Gallagher, T. W. Wilson and Buck Gallagher, from Adair county to Louisville. The pria-

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oners were arrested by different deputies or bailiffs, but they were all transported together. Still, each bailiff supplied himself with a guard, and there is a charge for his transportation.

The statute allows the marshal, for transporting criminals, ten cents a mile for himself and for each prisoner and *necessary* guard. The term criminals has always been construed to include prisoners arrested, charged with crime; and the term marshal has always been held to include deputy or bailiff. But there is no proof that these guards were necessary, and judging from the facts before me, I think they were unnecessary. I think three officers were sufficient to guard three ordinary prisoners.

I concede that, in this matter, much must be left to the good faith and judgment of the officer. Sitting here, I cannot ordinarily tell whether a guard is necessary or not; but I wish to say that, in respect to a privilege which is so liable to abuse, in which the officer is constantly tempted to act in his own interest, and not in the interest of the government, I shall be inclined to reject all charges for transporting guards unless I can perceive from the nature of the service that a guard was necessary, or unless the necessity for a guard be otherwise satisfactorily shown. The proof should be made by the officer employing the guard. It should also show who the guard was, and the necessity for having him, and it should, when practicable, be accompanied by the certificate of the commissioner before whom the prisoner was taken, of the presence of the guard.

In case of *United States v. James Young and Same v. Faulbree* and *Same v. Roberts*, the district attorney objects that the guards, for whom transportation is charged, were witnesses for the United States in said cases, who had been summoned and were paid for their mileage and attendance as

witnesses, and he insists that the marshal should not be allowed for the transportation of them as guards.

I am of the opinion that the objection is not well taken.

It is not disputed that the guards were necessary, and by the express terms of the statute the marshal is allowed for transporting criminals, himself and guard, ten cents each. It matters not whether the marshal pays the guard anything for his service, or whether he pays anything for transportation, he is allowed, under any and all circumstances, for transporting criminals, himself and necessary guard, a certain arbitrary, fixed fee.

In the case of the *United States v. J. N. Parks* the marshal arrested one Jerree M. Parks, but he was not the person charged with the crime mentioned on the warrant, nor the person whom the United States desired to be arrested. The marshal acted in good faith, believing the person arrested to be the person whom he was directed to arrest. I am of the opinion that none of the fees charged, growing out of the arrest, can be allowed. The prisoner arrested was falsely arrested, and no lawful fee can be based on or grow out of a false imprisonment.

In the case of the *United States v. Buck Gallagher* it appears that the person who made the affidavit on which the warrant was founded did not know the christian name of the offender, but supposed it to be "Buck;" that the name of the person whom he really accused and charged with crime is John Gallagher; that the name "Buck" was thus by mistake inserted in both the affidavit and warrant; that the person who made the affidavit accompanied the officer to the place of arrest and pointed out to the officer John Gallagher as the person charged and as the person mentioned in the warrant.

The district attorney objects that as the warrant did not specifically direct the arrest of John Gallagher, the charges

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made for his arrest, transportation, etc., cannot be allowed. I am inclined to the opinion that the objection is not well taken. I think the case the converse, or very nearly, of the case last stated. I think that John Gallagher, when brought before the commissioner, could not claim his discharge on the sole ground that his name was not correctly spelt or given in the warrant. Being the person actually accused, he could not, I think, complain of a false arrest or a false imprisonment.

In the case of the *United States v. Jack Bristow*, the person was arrested in the State of Tennessee, only a few yards beyond the Kentucky line. The officer acted in good faith, believing that he was in Kentucky, and that he was making the arrest in this State. I am of the opinion that the original arrest was illegal, and that the prisoner could not lawfully be held after he was brought into this State. *Hooper v. Lane*, 6 House Lords Cases, 443.

I am of opinion, therefore, that none of the fees growing out of or connected with this arrest can be allowed.

In the case of the *United States v. John Howard*, the marshal claims that his deputy was employed eight days in endeavoring to arrest the prisoner, and he charges for expenses while so employed two dollars per day—in all, sixteen dollars. It appears that the prisoner resided only thirty miles from the place whence the process issued, and that the bailiff was actually employed eight days “in endeavoring to arrest” is not shown by the oath or affidavit of the bailiff who made the alleged endeavor, but by the affidavit of the general deputy in whose account the charge is found, to the effect that his account is correct. I do not think this charge is sufficiently proven. It should be proven by the oath or affidavit of the bailiff who made the endeavor, and he should, when he charges for more days of endeavor than are obviously necessary, explain in his affidavit why he was

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employed the number of days charged, what endeavor he was making, and why the arrest was not made sooner. It is precisely in respect to these charges, where something must be left to the good faith of the officer, that there is the greatest danger of abuse. The officer is constantly tempted to charge for service which he does not perform, and the court and district attorney are limited in the opportunities to expose its error. I think, therefore, full and strict proof of all such charges should be required.

In this case I shall allow for only two days endeavor to arrest; and, consequently, will reduce the item of \$16 to \$4.

In the case of the *United States v. James Grimes*, the charge is transporting himself, prisoner and guard from Columbia to Louisville, 140 miles, \$42. By the route traveled the distance was actually 140 miles; but by the usual route between Columbia and Louisville the distance is only 107 miles. The route taken was by way of South Danville, and from the latter place to Louisville by railroad. The route usually taken is by way of Lebanon, and thence by railroad. The first route is often taken, and is in some respects the most comfortable and convenient, but it is not the usual one.

I am of the opinion that the mileage must be computed by the route usually traveled.

All the foregoing questions might and would have been decided, just as they have been, whether the rule for computing mileage on process issued and served in this district remains as fixed by the act of 1853, and section 829 of the Revised Statutes, or as is to be found in the act of 1875; but now a case has arisen in which it has become absolutely necessary to determine which statute furnishes the rule.

In case of the *United States v. James M. Johnson*, the warrant was issued at Louisville and returned there. The defendant resided at Lexington. The marshal actually trav-

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eled to Lexington, ninety-three miles, to execute the warrant. There he learned the defendant had gone to Mt. Sterling—where he would probably remain two days; so, to execute the warrant, he traveled from Lexington to Mt. Sterling—thirty-four miles. When he reached Mt. Sterling he learned that the prisoner had gone to Paris, and he followed him there, traveling eighteen miles. There he learned the prisoner had returned home. He then returned to Lexington, traveling eighteen miles, and there served the process. If the mileage is to be computed by the rule prescribed in section 829 the allowance will be limited to ninety-three miles; but if the act of 1875 furnishes the rule, then as the number of miles actually and necessarily traveled to serve the process is 163, the allowance must be for 163 miles.

Now, I think the act of 1875 was not intended to increase the mileage of marshals, but to diminish it. The complaint was not that the act of 1853 and section 829 did not allow enough mileage—the complaint was that they allowed too much. The complaint was that they allowed for mileage not traveled, and the object was to cut off all allowance for travel not performed, not to give an allowance for travel though actually performed, if it exceeded the distance from the place of return to the place of service.

I have already shown that process must, unless otherwise provided by statute, be returned to the court which issues it. All process is ordinarily placed in the hands of the marshal at the place of its issue. The consequence is that a marshal can rarely, if ever, travel, in going to serve any process issued in the district in which it is served, less than the distance “from the place of return to the place of service,” but he may and often will have to travel more. The consequence is that if the act of 1875 furnishes the rule for computing mileage on process issued and executed in the same district, it has signally failed to accomplish the end intended. It has

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not decreased allowance for mileage, but has provided for a largely increased allowance. The act of 1853, and section 829, Revised Statutes, made an allowance for mileage not actually traveled. It allowed a marshal, who served process coming from districts other than his own, mileage to be computed "from the place of return to the place of service," though this distance might be hundreds or thousands of miles, and though he had not actually traveled to serve the process more than one mile. It was to remedy this, and this only, that in my opinion the provision found in the act of 1875 was made. It was not made to change that of which there was no complaint. But the objection that the act of 1875 should not be so construed as to alter the rule for computing mileage prescribed by section 829, on process issued and executed in the same district, does not rest solely on the ground that the evil which it was intended to remedy, so far from being cured, would be made worse. It rests also on the more rational ground that there is no express repeal of any of the provisions of the old law, and that the negative language of the act of 1875 is scarcely appropriate to an increase, but rather to a decrease of allowance for mileage.

Moreover, the policy of all the statutes of the United States regulating the fees of officers, has been to prescribe certain fixed fees easily ascertainable, leaving nothing to the discretion of the officer, as little as possible to his integrity, and as little as possible to depend on proofs. If the construction of the act of 1875 contended for be admitted; if the marshal is entitled on every process executed by him an allowance for the miles actually and necessarily traveled, then on every process served, the question will arise, what was the number of miles actually and necessarily traveled? and the court thus have much of its time consumed in determining unpleasant squabbles over fees in which the complaining party can rarely obtain any relief, since, at last, the officer

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making the charge will ordinarily be the only witness who will know the facts.

I shrink from such labor and from such investigations, and I shall not undertake them unless Congress shall clearly impose them upon me. In all the investigations which I have ever made of the fees of marshals, I have rarely found anything wrong in those matters which are definitely fixed by statute, or are easy ascertainable by the court without reference to the oath of the officer. In almost every instance in which I have found a charge either wholly false or partially erroneous, it has depended for its verification on the discretion and good faith of the officer. So strong is the temptation to the officer to consult his own interests and to disregard that of him whom he serves; so strong is this temptation—when he may adopt without exposure either of two courses—to adopt the course which will yield him most that, in my opinion, he should, if possible, never be subjected to such temptation. His fees should, as far as possible, be fixed and definite, and not depend, except in cases which cannot be otherwise regulated, either on his discretion or integrity, or on facts which can be known to himself only.

So far as this court is concerned, I shall adhere to the rule prescribed in section 829 for computing mileage on all process issued and served in this district, without reference to the number of miles actually traveled to execute it, until Congress shall manifest a more certain intention to alter it than is to be found in the act of 1875.

To avoid misconception, I deem it proper to say that none of the charges which have been found to be erroneous are connected with any service rendered by the marshal himself. They all relate to service alleged to have been performed by his deputies or by bailiffs appointed by them, generally to service alleged to have been returned by the latter. The marshal himself did not suspect that any of the accounts

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rendered to him were incorrect. I acquit him of all blame, but in the future I shall expect him to examine and scrutinize every account before it is presented to the court, and to eliminate every item which he may deem incorrect or not proven, as required by the law as expressed in this opinion. Moreover, I shall expect him to dismiss from office every deputy who shall render to him a false account, or who shall abuse his authority by appointing bailiffs, or who shall, in any way, manifest a stronger desire to make fees than to serve the public.

So many criminals attempt to avoid arrest by flight or concealment, whenever the marshal comes into their neighborhood, that it is no doubt often necessary for him to avail himself of the services of a special bailiff. I would not, therefore, restrict his authority to appoint special bailiffs; but so universal has become the practice of Deputy Marshals to appoint bailiffs, and the fees of the Marshal have thereby been so enormously increased to the apparent gain of such deputies, that I cannot but suspect their incentive to such appointments is to make fees rather than to perform their duty. The marshal should hold every deputy to a strict account for every bailiff appointed by him.

IN THE MATTER OF THE APPLICATION OF SUN-
DRY CITIZENS FOR THE APPOINTMENT OF
SUPERVISORS FOR THE VOTING PRECINCTS
OF THE CITY OF CINCINNATI, ETC.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—
SEPTEMBER 16, 1878.

CONSTITUTIONALITY OF THE SUPERVISORS OF ELECTION ACT.

1. The act of Congress directing the appointment of supervisors in congressional elections by the circuit judge of the United States for such congressional district as may be reported, pursuant to such statute, is constitutional, and is obligatory on the circuit judge.

2. Such action by the circuit judge is judicial, and does not fall under the head of non-judicial action or such as is ministerial.

3. The Constitution declares that Congress may, by law, vest the appointment of such inferior officers as it thinks proper in * * * the courts of law. The supervisors are inferior officers. The court is not required to perform the duties prescribed for these commissioners, but its power is exhausted when such officers are appointed.

The act of Congress provides:

“Whenever, in any city or town having upwards of twenty thousand inhabitants, there are two citizens thereof, or whenever, in any county or parish, in any congressional district, there are ten citizens thereof, in good standing, who prior to any registration of voters for an election for representative or delegate in the Congress of the United States, or prior to any election at which a representative or delegate in Congress is to be voted for, may make known, in writing, to the judge of the Circuit Court of the United States for the circuit wherein such city or town, county or parish, is situated, their desire to have such registration, or such election, or both, guarded and scrutinized, the judge, within not less than ten

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days prior to the registration, if one there be, or if no registration be required, within not less than ten days prior to the election, shall open the Circuit Court at the most convenient point in the circuit."

The supervisors, to be thus appointed, are then, by subsequent sections of the law, authorized to be present during the registration or voting, take cognizance of what is done, and be present at the counting of the votes, simply with a view to secure fairness and impartiality in the elections and correct returns thereof.

George Hoadly represented parties who were opposed to the appointment of supervisors.

BAXTER, J.—I trust it will not be improper for me to say that I regret having been called upon to perform this duty. But the act of Congress imposing the duty is imperative, and if constitutional, must be enforced. Learned counsel have, however, insisted that it is unconstitutional: First, because it requires the courts to perform other than judicial duties; and Second, because its enforcement would be an invasion of the rights of the States.

Can these propositions, or either of them, be maintained?

The government, we concede, is divided into three distinct departments—the executive, legislative and judicial—each invested with appropriate functions, and neither can be lawfully required to encroach upon the prerogatives of either of the others, without violating the fundamental law from which they all derive their authority. If therefore the act which provides for the appointment of supervisors of elections required the court to perform non-judicial duties, I would follow the precedent of Chief Justice GRAY and other contemporary judges, so earnestly commended by counsel, and refuse

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to enforce it. I heartily concur in principles announced by the learned chief justice. The reasons assigned for declining to execute the Invalid Pension Act are clearly stated as follows: "That neither the Legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner * * * that the duties assigned to the courts by the (Invalid Pension) act are not of that description. * * * As therefore the business assigned to this court by this act is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it by *official* instead of personal descriptions."

By reference to the act it will be found that it designated the judges as commissioners, to take depositions and make reports to the Secretary of War, and authorized the Secretary of War to suspend, and Congress to revise, their decisions, and hence the learned judge added "that by the Constitution, neither the Secretary of War nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."

But what would have been the decision of the court if the act had required it to appoint commissioners to perform the duties prescribed? The Constitution declares that "Congress may, by law, vest the appointment of such inferior officers as it thinks proper, in the President alone, in the courts of law, or in the heads of departments;" and under this constitutional grant of power Congress has vested the President, the heads of departments and the courts with authority to appoint a great many subordinate officers. Amongst others, the courts have been authorized to appoint their clerks, Circuit Court, and other commissioners, and this power had been exer-

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cised by the judges who declined to enforce the Invalid Pension Act. Why is it supposed the courts would have refused to comply with the statutory command, if the Invalid Pension Act had authorized and required them to appoint commissioners to perform the merely ministerial duties by its provisions imposed? There would have been no greater impropriety in the court's appointing commissioners to perform the duties prescribed by that act, than in appointing clerks or Circuit Court commissioners under the several acts authorizing them so to do. The terms in which they express their objection to acting in the *non-judicial* character of commissioners indicate clearly, that without doubt or hesitation they would have appointed commissioners to discharge the same duties. The duty of the courts to appoint subordinate officers when required and authorized so to do by law, has never before been questioned, and cannot be upon the basis of any adjudicated case. All precedents and authority are to the contrary. The State governments, like the National, are divided into separate departments. There is no more power under the State constitutions to impose other than judicial duties on the courts than there is under the Federal Constitution. And yet by law in several of the States the appointment of judges of elections has been conferred upon the courts, and so far as I am advised the validity of these laws, or the propriety of their enforcement has not been questioned.

There is a very obvious distinction between the Invalid Pension Act and that under consideration. In the former, the judges were designated and required to act as commissioners. That duty they very properly declined to perform. And if the act under consideration commanded this court to supervise the elections, I should refuse to obey it. But the command is, that this court shall appoint others to perform

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that duty. The supervisors so to be appointed will be "inferior officers." The Constitution authorizes Congress by law to vest such appointments in the courts. Congress, by the statute under discussion, has authorized and commanded the circuit judges, when requested by the requisite number of citizens, to make the appointment which has now been asked for. And though this law may conflict with the opinions of counsel and those whose views they represent, as to the proper classification and division of powers between the several departments of the government, the Constitution and the act when construed together make the appointment of supervisors a judicial duty which this court cannot decline to perform without a flagrant violation of the obligations imposed upon it by law.

Let us now consider the second objection.

Does the act invade the rights of the States? If so, how? I do not anticipate any possible conflict between the State and National authority proceeding from the exercise of the power conferred by this act. Congress has the right to regulate the election of its own members, and by the Constitution each house is made the exclusive and final judge of their election and qualification. In the exercise of this jurisdiction witnesses may be summoned and examined, and investigations made into the fairness and regularity of elections. If this may all be done *after* election, may not Congress by law provide safeguards *before* election to prevent fraud, secure an honest count, and compel correct returns? This is all the appointment of supervisors is intended to accomplish. It is not contemplated that they shall supersede or exercise any part of the authority vested by State laws in the persons acting under State authority. Supervisors can neither admit nor exclude the ballot of any one offering to vote. They are not present to act as judges but simply as witnesses to remain with the officers holding the elections, take cognizance of

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everything done, and witness the counting of the votes polled with the purpose to secure fairness and impartiality in the conduct of the election. No injustice can possibly result from such action. It is only to those contemplating frauds either in the casting of the votes or in the counting and return thereof that these impartial witnesses provided by the law are a terror. Frauds perpetrated in the election of members of Congress are punishable in the courts. And while the supervisors to be selected from opposing political parties, cannot control the elections and are without authority to receive or exclude a vote, or do any act calculated in the slightest degree to intimidate a legal voter, yet they may, after the election, give evidence and secure the conviction and punishment of violators of the law, and to this class supervisors would naturally be obnoxious..

Thus far I have treated the questions argued as original, and as though there were no precedents in the enforcement of this law in other instances to support the views I have expressed. It was remarked in the argument that the protection intended to be given by the statute had not heretofore been invoked in this circuit. The statement is erroneous.

Judge HOADLY.—This district is what I said.

The COURT.—The statement is correct in reference to the districts; but the act has been enforced elsewhere in the circuit, as also in other circuits, and so far as I am aware the action of the courts in exercising the powers conferred has not in any instance been objected to.

I think the statute is constitutional; that it is obligatory upon me, and appointments will be made in accordance with its requirements. If after they are made the appointees shall do any act in excess of the powers conferred on them by the law they will be held amenable therefor. Their acts will be their own and not the court's. In making the appointments the court exhausts its powers, and therefore in their selection

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I wish to act with judicial impartiality, so as to secure men worthy of so important a trust, and for this purpose invoke the counsel and co-operation of good men of every shade of political sentiment who desire that the popular will may prevail and honest elections be secured.

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CHAS. G. EVERETT v. JONATHAN THATCHER
AND OTHERS.

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CIRCUIT COURT—NORTHERN DISTRICT OF OHIO—SEPTEMBER
TERM, 1878.

INSPECTION OF PATENT BY COURT—EVIDENCE—JUDICIAL KNOWL-
EDGE.

The court may, on the hearing of a cause in chancery brought to enjoin the infringement of a patent, inspect such patented article, and determine from this, without other evidence, whether it is or is not the subject of a patent.

Everett filed a bill in January, 1872, alleging the issue of a patent to William Baker for a new and improved clapboard joint; that in July, 1869, he acquired the exclusive right to make, use and sell the patent in Logan County; that since that time the defendants have made the patent joint and siding for houses, and that this patent was adjudged valid in the Circuit Court of the United States for the western district of Pennsylvania in November, 1870, in the case of *Anderson v. Schmidt*. There was a prayer for injunction

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and account. The defendants filed an answer, denying that Baker was the first and original inventor; alleging that before May, 1854, the invention was known and used by John Rowze and E. L. Small and by others, and that the re-issued patent of 1869 was void because it was enlarged so as to cover matters not embraced in the first issue, and which were previously known and used. Further, the allegation was made that the siding made by defendants was, since 1844, in common use.

There was a replication to the answer. The original patent No. 10,903 is to be found in Patent Office Report for 1854, vol. 1, p. 368; and the figure of the patent joint is in vol. 11, at p. 43. The re-issue, No. 3,268, is set out in vol. 11, p. 805, of the Patent Office Report for 1869.

The claim in this is as follows:

"1. The construction of the joint of clapboards, or jointed siding, for houses and other buildings, in such manner, that the boards when laid on the frame, shall lie flat and solid for their whole width against the frame of the building, and at the same time shall preserve the appearance and advantage of clapboarding in front by the outer lip of the upper board, at each joint, overlapping outside the board next below it, for shedding the water as described.

"2. The combination of the lock *a*, in the rear of the joint for holding the board to the frame at the lower edge as described with the extended lip C, Fig 1, in front for covering the head of the nail, as described, the whole being constructed, combined, and arranged substantially in the manner and for the purposes herein set forth."

In the schedule Baker claimed that he had "invented a new and useful *improvement* in the preparation and joining of clapboards, and the siding of houses and other buildings." He further claimed that the siding would "lie flat and solid against the posts and studs of the frame instead of touching

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the frame at their corners only, as is the case of ordinary clapboarding. At the same time they shall preserve outside the appearance and advantage of clapboarding by the outer lip on the lower edge of each board overlapping the full thickness of the upper edge of the board immediately below it for shedding the water. And *second*, by extending the outer lip of the upper board sufficiently for that purpose, may also cover the heads of the nails by which the boards are fastened to the frame, these being driven near the upper edge of the boards, where a small nail is sufficient, as the boards are thin at this point."

The figure intended to illustrate the invention is then described. A number of depositions were taken by defendants which tended to show that ordinary tongued and grooved flooring had been used for weather-boarding houses before the patent; that siding, though not exactly the same, yet similar, had been used by different persons, and specimens were annexed to some of the depositions. A witness testified that he had built a house in 1844 in Hudson, Ohio, with siding like a specimen produced, the only difference between that and the patented article being in the bevel. The plaintiff read depositions, which tended to show that the specimens produced were different in principle from the patented article.

At the March Term, 1878, the case was in part heard, and a portion of the evidence read, when the court intimated an opinion that on inspection of a specimen of the siding described in the patent, without reference to other evidence, it was not patentable; but continued the case with leave to file briefs.

Briefs were submitted by *Wm. Lawrence* and *Willy, Sherman & Hoyt*, for complainant.

A. T. Brewer, for defendant.

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BAXTER, J.—When this case was before us in March last, we inspected the model of the invention and intimated an opinion adverse to complainant. But his counsel are now insisting that we ought not to base our judgment in this case upon a personal inspection of the model, because they say it is not one of the things of which the court can take judicial notice. The proposition is certainly correct. We cannot take judicial notice of the model, nor have we assumed to do so. The patent is *prima facie* evidence of its own validity, and if nothing more appeared in the case, we would declare it valid and protect it against infringement. But it is only *prima facie* good and not conclusive. The responsibility of adjudicating it valid or invalid is with the court, and we must do this upon legitimate evidence legally adduced in the case. The model is competent evidence, and has been exhibited as such by the complainant. If the court is not authorized to inspect and pass judgment upon it, why is it introduced? It is a prevalent, if not universal, practice for the courts in litigation of this character to examine such models. And why may they not do so? Witnesses may be called to examine models of inventions as experts and give their opinions of their merits. And may not judges, upon whom the law imposes the duty and responsibility of deciding the question, not exercise their natural senses in the same way and to the same extent? It seems to us that judges, sitting in judgment upon the law and the facts, and called upon to decide whether a piece of coin offered in evidence and produced to the court is genuine or spurious, are at liberty to examine the coin for themselves, and apply such tests as are ordinarily applied, and exercise their own judgment in the determination of the question, and in doing so, they would not be exceeding their judicial functions, because the coin thus exhibited is made evidence before them. And if it were made a question of fact, whether a yard-measure

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produced before a court was greater or less than the legal length, the court would have the right to decide the disputed fact by an actual measurement. And if it is competent for a court to inspect a piece of coin or measure a yard-stick offered in evidence, may we not with equal propriety and under the same rules of evidence examine the model exhibited in evidence by the parties to this suit? The decisions of the Supreme Court afford numerous instances of criticisms of models exhibited before that court. The model offered in this case is not so complex as to be beyond the comprehension of the court. It is simply a piece of weather-boarding, grooved on one edge and beveled on the other. The invention is not such a new and useful improvement in that branch of mechanism as in our judgment makes it patentable. It, therefore, belongs to the public, and we think the complainant has not acquired such an exclusive right as entitles him to the protection of this court.

There is, however, other testimony on file showing the state of the art at the time which supports the view we have taken. But as we are entirely satisfied, from the personal inspection we have made, that the pretended invention is not patentable, we are content to rest our judgment on this evidence alone, and do not, therefore, desire to hear the evidence read. But in order to preserve the rights of defendants, we will consider it as having been read and as a part of the files of the case.

It has been urged that the patent involved has been adjudged valid by the Circuit Court of the United States for the western district of Pennsylvania, and this adjudication is relied on as authority here. The judgment of that court, if based upon a *bona fide* contest, and after careful consideration, would be entitled to great respect. But, as we are advised, that judgment was rendered on a *pro confesso* without answer or hearing, and upon the complainant's statement

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of his case. Such decrees are rendered upon mere motion, without investigation, and are not such adjudications as to preclude full inquiry by us.

A decree will be entered dismissing complainant's bill with costs.

WELKER, district judge, concurred.

JAMES S. ATTERBURY ET AL. v. J. J. GILL, ADMINISTRATOR OF A. J. BEATTY, DECEASED.

CIRCUIT COURT—NORTHERN DISTRICT OF OHIO—OCTOBER TERM, 1878.

ON DEMURRER TO BILL OF REVIVOR AND MOTION TO STRIKE DEMURRER FROM THE FILES.

REVIVAL OF SUIT.—Case is not revived unless order to that effect. Action against administrator survives, if there has been an infringement; the latter being held as a trustee for the owner.

Bakewell & Christy, for plaintiff.

Prentiss, Baldwin & Ford, for defendant.

Bill filed against respondent for infringement of patent, which was on an improved jelly glass. Respondent answered. Testimony was taken and a hearing had. Complainant had a decree establishing the validity of the patent and also the fact of infringement by defendants. There was a reference to commissioners to take an account of profits and damages.

The respondent died before the account was taken. After expiration of rule day to answer a bill of revivor under rule

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56, the administrator of respondent filed a demurrer to that bill, when motion was made by complainant to strike such demurrer from the files. Rule to amend had now expired, and prior to the filing of the demurrer no order had been made reviving the suit against the administrator, nor had the administrator obtained leave to file the demurrer.

WELKER, J.—Under rule 56, the case was not revived unless an order to that effect was made, and in this particular case the demurrer was allowed to stand as if filed on rule, and the motion was overruled.

The demurrer raises the question of the survival of actions for infringement of patents, against the administrator of the infringer after a decree of infringement and reference to master or commissioner to assess amount for which decree was to be entered.

1. Although as a general rule, actions for torts do not survive against the representatives of deceased defendants pending the suit, yet these proceedings in equity for infringement of patents are not strictly proceedings for torts. The respondent who infringes a patent is held in equity as a trustee of the owner of the patent and compelled to account to him for the profits realized from the manufacture of the infringing machine or product.

The infringer is also liable to the patentee for damages for such infringement, and both of these causes of action are combined in the case in equity, as well as the prayer for perpetual injunction.

2. In this case, the decree having settled the question of infringement, and the case having been referred to the master, before the death of respondent, to ascertain the amount for which the decree should be rendered, which will embody either both or one of these claims of claimant, therefore the action does survive.

The demurrer is overruled and order of revival entered.

The Manitoba.

THE MANITOBA.

DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—OCTOBER TERM, 1878.

DUE DILIGENCE—COLLISION.

1. The collision act of 1864 provides that when steamers are meeting end on or nearly end on, they shall port—each one—and go to the right, but this applies to cases in which each steamer is, at night, in such position as to see both of the colored lights of the other. Where the red light is opposite the red light of the other it does not apply, and if the green light of one of the steamers is opposite the green light of the other, or if in any case each vessel shows to the other a single colored light directly ahead, or where both lights are anywhere but ahead, the rule does not apply.

2. There is no general obligation to slacken speed, although two steamers are found approaching each other in such a way as that it is necessary to change the helm in order to avoid a collision, yet such an obligation arises in case of continuous approach or when the approaching light is found to be closing in instead of opening out.

3. If the question be whether there was promptness in giving and executing orders upon a steamer immediately before a collision, the fact that the master left the deck after the lights of the approaching vessel had been seen, and did not return until after a collision had become inevitable, may be looked to, as also the further fact that the engineer for two or three times left his post to observe the approaching lights. The court may properly consider such facts as indicating a want of due diligence.

The Comet was bound from Grand Island, Lake Superior, to Cleveland. Having rounded White Fish Point at about 8 p. m. she saw the red light of the Manitoba when about one-fourth to one-half a point upon her port bow. The Comet immediately ported her wheel half a point and steadied. After running on a short time and finding that the Manitoba failed to open out, she ported again half a point, blew her whistle, which was not answered, and failing

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to shake off the Manitoba, which seemed to be swinging under her starboard wheel, the Comet again was put hard a port, the Manitoba now shutting in her red and opening her green light. Then the engines of the Comet were stopped and reversed, but it was too late. She was struck on the port bow by the Manitoba and cut nearly in two, and sunk in less than two minutes. Eleven on board were lost.

The Manitoba was charged with having brought about the result, because of starboarding her wheel instead of porting as she ought to have done, as the vessels meeting were end on, or nearly end on.

The Manitoba claimed that, having passed St. Mary's canal, she made the bright light of the Comet when about half way between Round Island and Iroquois Point,—that the Comet was coming on from the direction of Whitefish Point, and, if not heading on a course almost parallel opposite to that held by the Manitoba, was nearly doing so. The steamer, running at a moderate speed, was going about N. W. $\frac{1}{2}$ N., and as the Comet was approaching she showed her bright and green light, which bore from one-half to three-fourths of a point upon the starboard bow of the Manitoba; that the latter vessel endeavored, if possible, to avoid the collision and to that end starboarded half a point and steadied, but the propeller still came on, now exhibiting her green and white lights, and as though she would fairly pass to the starboard of the Manitoba. In fact she seemed to be off a little, but on a sudden she swung to starboard and across the bows of the Manitoba as though she were under a port wheel. The Manitoba at once was put hard-a-starboard, the engines were stopped and reversed, but the propeller had approached so near that the collision was inevitable.

The Comet, it was averred, had committed a fault in not starboarding instead of porting. The question raised and argued was: Whether these vessels on approaching each other had exhibited to each other a green or red light.

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H. L. Tyrrell, for libellants.

W. A. Moore and *F. H. Canfield*, for claimants.

BROWN, J.—Before entering upon a discussion of the testimony, there is a legal proposition, to which the attention of the court was challenged at the outset of the argument, and which libellants claim is decisive of the case. Admitting the theory of the *Manitoba* to be true, that she made first the bright and then the green light of the *Comet*, three-quarters of a point on her starboard bow, it was insisted that the steamers were still meeting “nearly end on” within the 13th article, and that it was incumbent upon the *Manitoba* to port, instead of starboarding, as she did. The words “nearly end on” used in the 13th article, are susceptible of two entirely distinct interpretations. On behalf of the *Comet*, it is urged, that if vessels are approaching so nearly end on, that prudence will suggest a change of the helm to avoid a misapprehension or chance of collision, such change should always be made by porting, notwithstanding the approaching vessel may exhibit a green light upon the starboard bow. Under the other definition, if the two vessels are each exhibiting to the other lights of the same color, there is no risk of collision within the meaning of the article, and each vessel is bound to keep its own side and may pursue its course with unabated speed, or, as formulated in the lines of Mr. Gray, “Green to green or red to red, perfect safety, go ahead.”

The earlier decisions, both English and American, no doubt go far to sustain the position of the libellants upon this point. The Merchant Shipping Act, which in England preceded the present law, under which the vessels of all civilized nations are now navigated, provided that: “Whenever any ship, whether a steam or sailing ship, proceeding in one

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direction, meets any other ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of the other"—a rule substantially like the 13th article, except that it imposes upon the sailing vessel an obligation to port when meeting a steamer. In construing this rule in the case of *The Maugerton*, Swab. 120, a ship which was running free was held to be in fault, because seeing a steamer's green or starboard light three or four points on her starboard bow, she held on her course, the master believing that, if the steamer did likewise, the vessel would have gone clear. He ought, it was said, to have expected that the steamer, on seeing his light, would have followed the rule and have ported; and should, therefore, have ported his own helm. See, also, *The Admiral Boxer*, Swab. 192. In *The Cleopatra*, Swab. 135, a steamer was condemned for having starboarded on making the bright and green lights of an approaching vessel three points on her starboard bow, distant about three miles. So, too, in the case of *The Stork*, Holt, 151, decided after the present law had taken effect, Dr. LUSHINGTON held, that in order to excuse the *Stork* from porting, "it must be quite clear there were three points difference and not less, for surely it would never do to contend, where they were so nearly meeting end on, that if the evidence should be it was one or two points only in the direction they were meeting, that that would be sufficient to dispense with the observance of this rule. On appeal to the privy council, the court refused to adopt the language of Dr. LUSHINGTON, but observed it was not necessary to lay down any rule if it were competent for them to do so. "It is sufficient to say, that, whether the vessels were in such a relative position as to involve the risk of a collision, must be always a question of

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fact to be determined upon the circumstances." The court, however, found that the vessels were in such a relative position that their course, if pursued, would have involved risk of a collision, and dismissed the appeal. In the case of *The City of Paris*, Holt, 21, the question was put to the assessors: "When the steamer first saw the steam tug moving toward her, and two points on her starboard bow, taking into consideration these vessels being on opposite courses, was there danger of their meeting end on, or nearly end on, so as to involve a risk of collision?" and they answered, "That the vessels were coming nearly end on, and the duty of each was to have ported." In the case of *The Fingal*, Holt, 160, the court considered that if vessels were within two points of meeting end on, they would fall within the latter part of the statement, "nearly end on." In the case of *The Artemas*, Holt, 75, a difference of two points was held, not to exempt the vessels from the regulation of the 11th article. See also *The Mexican*, Holt, 130. A similar want of definiteness is apparent in the American authorities. See *The Milwaukee*, 1 Brown's Admiralty, 313; *The Nichols*, 7 Wall. 656.

These varying constructions of the act naturally led to a want of uniformity in the practice, ship masters as well as courts disagreeing among themselves as to how great a variance from dead ahead would still meet the requirements of nearly end on. There was a further difficulty involved in the fact that the exhibition of a green light or green and white lights directly ahead, or on the starboard bow is consistent not only with vessels approaching upon a parallel course, but upon a course across that of the other vessel, in which case porting the helm would bring about the very disaster it was designed to avoid; in other words, the light may be dead ahead or nearly dead ahead, and yet the two ships may not be meeting end on. To justify porting under article 13, not only must the ship carrying the light be end on, but

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the two ships must be *meeting* each other in that position, and the exhibition of a single colored light directly ahead by no means justifies that inference.

To put an end to this uncertainty, and to define with the utmost practicable exactness the meaning of the words "nearly end on," on the 30th of July, 1868, an order in council was issued to the following effect: "The said two articles, numbered 11 and 13 respectively, only apply to cases where ships are meeting end on or nearly end on, in such a manner as to involve risk of collision. They consequently do not apply to two ships which must, if both keep on their respective courses, pass clear of each other. The only cases in which the said two articles apply are when each of the two ships is end on or nearly end on to the other; in other words, to cases in which, by day, each ship sees the mast of the other in a line or nearly in a line with her own, and, by night, to cases where each ship is in such a condition as to see both of the side lights of the other. The said two articles do not apply by day to cases in which the ship sees another ahead crossing her own course or, by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light or a green light without a red light is seen ahead, or where both red and green lights are seen anywhere but ahead." While this order has never been formally accepted by the Supreme Court as the correct interpretation of the 13th article, it has received the sanction of the District Courts for the southern and eastern districts of New York, and has not, so far as I can gather, been repudiated anywhere. It was adopted *verbatim* by Judge BLATCHFORD in the case of the *Steam Ferryboat America*, 3 Benedict, 424, and was approved by Judge BENEDICT in *The Sylvester Hale*, 6 Benedict, 523. By an imperial decree promulgated May

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26, 1869, it was incorporated in the law of France (De Fresquet, *Des Abordages*, p. 107.) It appears also to have been adopted by Hamburg, Russia and Sweden, in 1868. While in some cases, where a colored light is made very nearly dead ahead, it may lead vessels to approach each other in a dangerous proximity, it is quite evident that so long as each exhibits to the other a light of the same color, there can be no collision, and any liability to error or confusion can be obviated by porting from a red, or starboarding from a green light. As it is very desirable that the construction given to this law should be as uniform as the law itself is general, particularly upon waters where British and American vessels are constantly meeting each other, I deem it the safer and better plan to adopt the order in council as the law of this court, at least until overruled by a higher authority. I hold, therefore, that under her theory of the facts, the *Manitoba* was not in fault for starboarding as she did.

What the exact facts of the collision are it is certainly difficult to determine. Not only is the testimony upon either side in direct and irreconcilable conflict with that upon the other, but the witnesses upon one, if not upon both sides, swear to appearances utterly inconsistent with the movements of their own vessels as stated by them. The theory of the *Comet* that she made the red light of the *Manitoba* and kept it constantly on her port bow is not only sworn to directly by her master, her second mate, and her wheelsman, but it is claimed to be verified, and in fact demonstrated, by two subordinate circumstances, proved by uncontradicted testimony.

First. That the *Comet*, in rounding Whitefish Point, hugged as close to land as possible, expecting heavy seas, and, hence, when she straightened up on her course to Point Iroquois, she was further to the westward than the usual course of vessels intending to round that point would take

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them; while the Manitoba, intending to make Michipicoten, on the northeast shore, would naturally have been further to the eastward than the usual course of vessels rounding the point would take them.

The testimony of the Comet's crew does tend to show that she passed a little nearer to the point than usual, although there was a heavy wind from the southeast blowing on to the point, and it is a little difficult to see why she should wish to hug it so close; but in that regard, it appears to be contradicted by that of the master and mate of the Havana, a steamer bound up, which passed the Comet a short distance below Whitefish Point and some seven or eight hundred feet upon her port side. These witnesses swear they passed Whitefish Point themselves at the usual distance of a mile or a mile and a quarter, indicating that the Comet was probably about a mile out from the Point when she passed it. In this connection, they also swear they saw the Manitoba's light astern and upon their port quarter. While it is true the Manitoba was intending to stop at Michipicoten, the direct course to which would lead her a considerable distance off Whitefish Point, yet as her crew unite in swearing that they were steering for the light upon the Point, keeping it a little off their port bow, and intending to pass it at the usual distance, I do not feel at liberty to say that they are not to be believed in this particular.

Second. Shortly after rounding Whitefish Point, the Comet made the lights of the barge Havana, a little to port, and to give her an easy berth she ported half a point and ran from five to fifteen minutes under this port wheel, before resuming her southeast course down the lake.

Whatever weight is given to this testimony is counterbalanced by the fact, that the general course of the Comet down to the lake was half a point further to the eastward than it would have been if she had been sailing in a course

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directly opposite to that of the Manitoba. The course of the Manitoba was northwest half north, while that of the Comet was directly southeast. The tendency of this divergence would be, assuming that the compasses of each were exactly alike, to display the green light of the Comet to the Manitoba. A change of half a point from a course parallel to that of the Manitoba, would, in a distance of six miles, carry the Comet about half a mile to the eastward of the Manitoba's course, assuming that the Manitoba was pursuing the usual course from Point Iroquois to Whitefish Point. While there is nothing showing that the Comet did deviate to that extent, it seems to me to offset any inference, which might be derived from the fact of the Comet porting to pass the Havana, that she was westward of the Manitoba's course.

Third. It is claimed to be a physical impossibility that these vessels should have collided as they did, from the positions in which the evidence of the Manitoba places them, at the time the Comet's wheel was put hard-a-port, and the Manitoba's hard-a-starboard. At the time the Comet put her wheel hard-a-port, and exhibited her red light, the witnesses on board the Manitoba claim that she was from 350 to 400 feet ahead of her, and about the same distance to starboard. The speed of the Manitoba being considerably greater than that of the Comet, it would seem to follow that if the helm of the Manitoba had been put to starboard at the same time that that of the Comet was put to port, the Manitoba would have passed the point of intersection first; and hence, the inference is, that the relative positions were not as stated by the Manitoba, but that the Comet was to the port instead of to the starboard.

Assuming that the helms of both vessels were put hard over at the same moment, and adding to this the fact that the Manitoba was the faster vessel, it would necessarily follow that she would have passed the point of intersection

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first. But the theory of the *Manitoba* is not inconsistent with a sudden prior porting on the part of the *Comet*, and a failure on the part of the *Manitoba* to swing as rapidly to starboard as the *Comet* did to port. If the *Comet* ported her wheel before the *Manitoba* starboarded (and this is the *Manitoba's* theory) she would have the advantage of the *Manitoba*, and might pass the point of intersection first; it would naturally take some little time for the *Manitoba* to get her wheel hard over, and to deviate from her course. There is another inference, however, to be deduced from this theory of the *Manitoba*, to which allusion will be made hereafter.

The case made by the *Comet* is manifestly inconsistent with itself and untrue. If she made the *Manitoba's* red light on her port bow, and ported half a point and again another half point, and still she could not open out the approaching vessel, it shows conclusively they must have been approaching on converging lines, and the *Manitoba* must have displayed a green and not a red light. I am more inclined to think, however, that she made the red light of the *Manitoba* on her starboard bow; that her first porting brought her on a course exactly parallel to that of the *Manitoba*, and that her green light was displayed at a considerably greater distance than the *Comet's* testimony would seem to indicate, and that the collision was brought about by a persistent effort to apply the 13th rule, and to pass the *Manitoba* under a port helm. This is corroborated to a certain extent by the statement of Rafferty, the wheelsman, on cross-examination, that he judged the *Manitoba* was half a mile off when she showed her green light. I feel compelled to say, too, that considerable doubt is thrown upon the *Comet's* case by the testimony of Mr. Hathaway, the reporter of the *Free Press*, who swears that Captain Dugot told him that he had been on deck about half an hour, and leaving the boat in charge

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of the mate went below, but was not gone more than five minutes before returning. Hathaway being entirely disinterested, I am disposed to credit his testimony, notwithstanding Dugot's denial.

The case of the Manitoba is supported by the testimony of her master, mate, wheelsman, engineer and cabin boy, whose statements are also corroborated by those of four passengers. While in an ordinary collision case, the court will pay very little regard to a mere superiority in the number of the crew sworn, and will seek to determine the question of fault by the uncontradicted testimony, and by the probabilities of the case, I do not feel at liberty to treat so lightly the testimony of disinterested and intelligent passengers, provided they are so located as to be able to observe the bearing and color of approaching lights. The testimony of the Manitoba's passengers has aided me greatly in solving the difficult problem of the relative bearing of these vessels.

George Bisset, a merchant of Kinkarden, who was standing forward on the promenade deck, for twenty minutes before the collision, noticed the Manitoba steering between the white light of the Comet and the light upon Whitefish Point. Captain Symes came back and spoke to him; showed him the green light, and said: "We have to pass on the green side with our green side, and if a red light was shown we have to pass on the red side;" was then standing right at the center of the promenade deck; stood there until four or five minutes before the collision, then going for a moment into the cabin to light a cigar, returned to the deck and stood leaning against the railing on the starboard side, about twenty feet from the stern. The Comet was still displaying a green light; looked over his left shoulder to see her pass, and not seeing her, looked ahead and saw her cross the bows of the Manitoba. George W. Barry, a druggist and insurance agent of Lucknow, was standing on the bow of the

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boat on the promenade deck, fifteen minutes before the collision; saw the bright light of the Comet on the starboard bow, and Whitefish light on the port bow, but did not notice the colored light. Noticed Bisset and Captain Symes talking together; saw the sudden sheer of the Comet across the bow. John S. Tenant, a physician of Lucknow, was standing on the promenade deck, at the foot of the ladder to the right of the pilot house; saw the white and green lights of the Comet on the starboard bow; the Manitoba seemed to be steering between the Comet and Whitefish Point light; suddenly saw her sheer and show a red light so near that he thought he could throw a stone aboard of her. Angus Bethune, paymaster on the railroad, from Fort William to Red River, had been to Ottawa on government business, and was returning on the Manitoba. Was sitting at the door of the engine room, taking a smoke; got up and walked to the forward right hand gangway of the steamer to look for Whitefish Point light; saw a steamer ahead; called the engineer and remained there, and soon discovered the steamer was coming towards us; said to him, there was a steamer coming, and that she was on the wrong side. The engineer came up and said there was plenty of room to pass on that side. Soon saw the Comet down upon us, her broadside crossing our bow. The engineer looked and ran back to his engine. She would have passed on our right hand side if she kept her course; seemed to be a couple of lengths or more off when she changed her course.

Now conceding, what unfortunately is too often true of sailors, that they place a higher value on fidelity to their vessel than upon fidelity to truth, and esteem their allegiance more sacred than their oath, I cannot assume that mere passengers are actuated by any such motives. These four men have sworn to a state of facts entirely inconsistent with the theory of the Comet, and strongly corroborative of that

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of the Manitoba. They were in a position to see, and they can hardly have been mistaken. They have sworn to the truth, or they have been guilty of a perjury which has not even the excuse of self-interest to palliate its heinousness.

I do not overlook in this connection the statements said to have been made by the master and engineer of the Manitoba after the collision. They are sworn to by the master and second mate of the Comet, and denied by the parties who are said to have made them.

As the witnesses on both sides are equally interested, and the words are very likely to have been misunderstood, I must hold that they are not proven.

Upon careful perusal of this testimony, I am forced to the conclusion that these vessels were mutually displaying their green lights, and that the collision was brought about primarily by the unauthorized porting of the Comet.

It only remains to consider whether the Manitoba be not also in fault for not slackening speed. The testimony is uncontradicted that the engineer did not receive the order to stop and back until just as the vessels came together. That there is no general obligation to slacken speed, notwithstanding two steamers are approaching each other in such a manner that a change of helm is necessary to avoid risk of collision, is undisputed. *The Earl of Elgin*, L. R. 4 P. C. 8; *The Free State*, 91 U. S. 200.

It is equally clear that this obligation does arise, whenever there is any uncertainty as to the position or movements of the approaching vessel, or when she appears to be violating the rules of navigation. In the case of the Earl of Elgin, an exception is made of cases of a "continuous approach" by which we are to understand, not merely where the two colored lights continue to be visible, but a single light appears to be closing in in such a manner as to indicate that the courses of the two vessels are converging. So in the

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case of *The Scotia*, 14 Wall. 181, the court remark, "We have already said that she was not bound to take any steps to avoid a collision until danger of collision should have been apprehended, and we think there was no reason for apprehension until the ship light was seen closing in upon her." S. C. 7 Blatch. 312; see, also, *The Mary Sanford*, 3 Benedict, 100.

In the case of *Dyer v. The National Steam Navigation Co.*, 3 Benedict, 173, the steamer was condemned for not slackening speed under similar circumstances. The court observed, page 178, "It was the duty of the steamer, as soon as it was noticed that she was not shaking off the light by porting her helm, to have slackened her speed, and ascertained the direction in which the ship was sailing, and acted accordingly; instead of which she kept up her full speed until the collision was inevitable."

I see no reason to doubt that the Comet continued to show her green light until within a short distance of the Manitoba. Her course diverged a half a point to the eastward of the Manitoba, consequently her first porting brought her upon an exactly parallel course, and as she was to the starboard of the Manitoba she would continue to display her green light, and as the Manitoba starboarded and opened out this light, she might port another half point without shutting it in or showing the red; but approaching the Comet so nearly end on as she did, she was bound to watch her lights with the utmost vigilance, and to ease her engines the moment she perceived the Comet was failing in her duty. There could be no collision so long as the Comet continued to exhibit a green light, but there might be such an approach of this light as to show that the Comet had ported, a manœuvre which, if persisted in, would inevitably throw her across the path of the Manitoba, and bring about a collision. That such continuous approach took place and was observed, is

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evident from the testimony of the master and mate. Captain Symes says that he made the green light three-fourths of a point on his starboard bow; that he remained on deck five or six minutes, and the green light then bore at least half a point on his starboard bow, showing, at least, that he was not opening it out. The mate, who remained in charge of the *Manitoba* up to the moment of the collision, says, that when they were one and a half or two miles apart, the green light bore three-fourths of a point on his starboard bow; that he then starboarded half a point, making the green light one and a fourth points off his starboard bow, but that when the *Comet* began to swing, the lights had closed in, so that it was not more than half a point or a point off. This shows that from the time the *Manitoba* starboarded, the *Comet* was steadily drawing in under a port wheel. If the two steamers were approaching upon an exactly parallel course, the light of the *Comet* would naturally open out, and the starboarding of the *Manitoba* would increase this tendency, so that if the *Comet* had kept her course, the angle of the green light with the course of the *Manitoba* would constantly approximate to a right angle. Instead of that, the light kept steadily closing in. There could be but one inference from this—the *Comet* had ported. This was manifest some time before she shut in her green light and displayed her red light, and the *Manitoba* should at least have eased her engines or blown a whistle, as required by the universal custom upon the lakes.

Nor am I satisfied that the order to stop and reverse was given as promptly as it should have been. According to the *Manitoba's* theory, the *Comet* was from 350 to 400 feet to the starboard, and about the same distance ahead of her before her change of light was observed. The entire testimony on the part of the *Manitoba* tends to show that the *Comet* would have passed from 300 to 400 feet from her if

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she had kept her course. Admitting that distances are deceptive, and that the Comet might have been much further ahead of the Manitoba than 400 feet, yet it seems to me, if the engines of the Manitoba had been promptly stopped and reversed, a collision might have been avoided. Obviously, this was the first and instant duty of the Manitoba, upon discovering the change of lights. A change of wheel was a matter of secondary consideration, but the obligation to stop and reverse was imperative. In this respect the case is much like that of *The Comet*, 9 Blatch. 323, where the injured vessel in this case was libelled for sinking the steamer Silver Spray in Lake Huron. The observations of Judge WOODRUFF in that case, page 328, are pertinent here. He condemned the Silver Spray, not only for starboarding, but for failure to slacken speed after the red light was disclosed upon her starboard bow. While I make no criticism upon the action of the Manitoba here in putting her helm hard-a-starboard, although I think this was an error, I am of the opinion that she should have stopped and reversed. If she had ported or slowed and backed, and perhaps if she had done nothing, the collision would not have taken place. After a collision has become imminent, almost any error on the part of the steamer will be pardonable except that of not stopping and reversing; and for this error, which is rendered more probable by the fact that the engineer left his post and ran to the starboard gangway, after the Comet put her helm hard-a-port, I think the Manitoba must be condemned. *The Great Republic*, 23 Wall. 20. I think, too, the conduct of the master in leaving the deck after the Comet's light had been visible for some time, and not returning till the collision had become inevitable, is open to criticism. Such changes in command are likely to lead to confusion, and are looked upon with great disfavor by the courts. *Haslett v. Conrad*, 1 Dillon, 79.

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A decree will be entered apportioning the damages and referring it to a commissioner to ascertain and compute the same.

HENRY W. TYLER vs. GEORGE R. HAGERTY,
AMANDA MOORE AND CLINTON IDLER.

CIRCUIT COURT—NORTHERN DISTRICT OF OHIO—OCTOBER
TERM, 1878.

MOTION TO REMAND CASE TO THE COMMON PLEAS OF OTTAWA
COUNTY.

Where there are several defendants, to entitle a non-resident to remove a cause to the Circuit Court, there must be a controversy wholly between him and the plaintiff, so as in effect a final decree would settle the whole case.

WELKER, J.—The petition was filed in the Common Pleas of Ottawa County, by Henry W. Tyler, against George R. Hagerty, Amanda Moore and Clinton Idler, to compel a specific performance of a contract in writing for the sale of real estate lying in said county, made by Hagerty to Tyler on the 7th day of September, 1876; also alleging that Tyler, after the making of the said contract, and before the commencement of the action, fraudulently conveyed the land so sold to Moore, and made a lease for a part thereof to Idler, the other defendant, and prays the enforcement of the contract against Hagerty, and also that the conveyance made to Moore and Idler be set aside and they be ordered to convey the land to the plaintiff. Hagerty filed an answer to the petition denying plaintiff's right to enforce the contract.

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The plaintiff and the defendants, Moore and Idler, are citizens of the State of Ohio, and the other defendant, Hagerty, is a citizen of the State of Missouri.

At the first term of the Court of Common Pleas of Ottawa County, at which the case could be tried, the defendant, Hagerty, filed a petition therein for the removal of the case to this court, and executed and filed the necessary and proper bond, and an order was made by said court making such removal, and on the first day of the next succeeding term, to-wit: the second day of October, 1877, filed a copy of the record of the case in this court.

The plaintiff files a motion to dismiss the case from this court and remand the same to the Common Pleas, on the grounds:

First. That the controversy involved in the case is not wholly between citizens of different States.

Second. That the controversy can not be fully determined between the plaintiff and defendant, George Hagerty, a citizen of Missouri.

Third. That the controversy is between citizens of this State.

The only question presented in the motion is whether the defendant, Hagerty, being a citizen of Missouri, has a right to remove the case to this court.

In the second section of the Act of March 3, 1875 (vol. 18, Revised Statutes, page 470), providing for the removal of causes from the State Courts to the National Courts, it is provided: "And if in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

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Is the controversy involved in this case wholly between the plaintiff, a citizen of Ohio, and the defendant, Hagerty, a citizen of the State of Missouri? A part of the controversy is between them, and part of it is between the plaintiff and the other defendant, Moore, who is a citizen of Ohio. As to Hagerty, the controversy is whether he sold the land, as claimed by the plaintiff; whether the plaintiff has complied with the contract, and Hagerty refused to do so. As to Moore, the controversy is whether Hagerty fraudulently conveyed the land to him after the sale thereof to the plaintiff. A judgment against Hagerty that he shall convey the land does not determine the controversy. The character of the conveyance to Moore remains to be determined in the suit. So that the controversy cannot be fully determined between the plaintiff and the defendant, Hagerty.

The controversy is really between the plaintiff on the one side, and the defendants, Hagerty and Moore, on the other, and is not, therefore, wholly between the plaintiff and the defendant, Hagerty. This being the relation of the two parties, it is not such a controversy as entitles the defendant, Hagerty, to remove the case to this court.

Motion sustained and cause remanded.

Fulton v. Gilmore.

JOHN A. FULTON vs. JAMES T. GILMORE.

CIRCUIT COURT—NORTHERN DISTRICT OF OHIO—OCTOBER,
1878.MOTION TO DISCHARGE DEFENDANT FROM ARREST ON MESNE
PROCESS.

PRACTICE.—While the pleadings, practice and forms in the Circuit and District Courts should conform as near as may be to the practice in the State Courts, yet a commissioner of the United States may, as an officer under the State law, take the verification of all necessary papers in order to procure the arrest of the defendant.

Prentiss & Vorce, for plaintiff.

E. J. Estep, for defendant.

WELKER, J.—This action is founded upon a promissory note of the defendant for the sum of eight hundred dollars.

With the petition, the plaintiff filed an affidavit that the defendant had property, money and rights in action which he fraudulently concealed, and setting out particular facts as required in the Ohio Code, and asked an order of arrest, which was issued by the clerk of the court, and defendant was arrested by the marshal.

The affidavit was verified before George Wyman, a commissioner of this court.

The defendant moves a discharge from such arrest because the affidavit is not verified before an officer authorized to make the same.

The authority of the commissioner to administer the necessary oath, presents the only question relied upon in the argument of the case.

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The grounds for arrest of a defendant, and the mode of procuring it are provided in the Code of Civil Procedure of this State.

Section 146 of the Code provides that "an order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, made before any judge of any court of the State, or clerk thereof, or justice of the peace, stating the nature of the plaintiff's claim, etc., and establishing one or more of the following particulars: * * *

3. "That he has property or rights of action which he fraudulently conceals."

The defendant claims that the affidavit must be made before one of the officers above named, and if not so done the order of arrest cannot be issued.

Section 914 of the Revised Statutes of the United States provides that "the practice, pleadings and forms and modes of proceeding in civil causes * * * in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like cases in the Courts of Record of the State within which such Circuit or District Courts are held."

Section 990 provides that "no person shall be imprisoned for debt in any State on process issuing from a court in the United States, where by the laws of such State imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any State, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such State."

Rule 1st of this court provides that "actions shall be com-

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menced and prosecuted, and process shall be issued, endorsed, made returnable and served in the manner provided in the code of civil procedure of the State of Ohio, except as otherwise provided in these rules, or in the laws of the United States applicable to special cases."

It will be seen from the above references that the practice in this class of cases of the State courts has been adopted and recognized, not literally, but substantially, or "as near as may be," in like proceedings in this court.

The question then arises whether, in applying the State laws to cases in this court, the verification of the necessary papers required to be made, in order to procure an arrest of a defendant, must be strictly confined to the officers named in the section of the code, that is, judge or clerk of a court of the State, or justice of the peace, or whether the officers of the court who are authorized to administer oaths and verify papers used in the court, may not take such verification?

Section 945 of the Revised Statutes provides that "bail and affidavits when required or allowed in any civil cause in any Circuit or District Court may be taken by a commissioner of the Circuit Court for the district." Under this section, the commissioner before whom the affidavit was made had complete authority to take affidavits to be used in this court in all civil cases. But it is claimed inasmuch as this proceeding restrained the defendant of his liberty by his arrest, the law must be strictly complied with, and the affidavit producing that restraint must be made before one of the officers named in the code. This seems to me an exceedingly narrow construction of the United States Statutes adopting the practice and mode of proceedings of the State Courts.

It was only intended by them, in this class of cases, to require the same grounds for arrest of a defendant, and to be made appear by affidavit, as was required by the State law,

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leaving the verifications to be made before such officers as are authorized to take such affidavits or verifications in this court, as well as to use the officers of this court to serve and execute process, or, in other words, use the official machinery of this court instead of the State Court.

Any other construction would require a plaintiff to find a State judge, clerk, or justice of the peace, who is unknown to this court, to take the verification, and also require the arrest to be made by a sheriff instead of the marshal, thus making it exceedingly inconvenient to use such State mode of procedure.

The motion to discharge is therefore overruled.

WILCOX & GIBBS SEWING MACHINE CO. vs. E.
FOLLETT AND L. B. KINNEY.

CIRCUIT COURT—NORTHERN DISTRICT OF OHIO—OCTOBER,
1878.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

1. Parties seeking to remove causes to the United States Courts must comply strictly with the provisions and conditions presented by the statute, and any material omission will be fatal to such removal.

2. The petition for removal must be filed at the term at which the case can be first tried and before trial thereof, and not after such term.

WELKER, J.—In this case petition was filed by the plaintiff in the Court of Common Pleas of Cuyahoga County, against the defendants, on the 24th of January, 1877, and summons served same day on Kinney.

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On the 24th of February, 1877, being at the first term of that court, when the case could be first tried, the defendant, Kinney, filed his petition for removal, on the ground that the plaintiff was not a citizen of the State of Ohio. A bond was filed the same day, conditioned "to enter or cause it to be entered in the Circuit Court, on the first day of its stated term next ensuing after the order of said Court of Common Pleas, for the removal of said suit into said court a copy of the record in said suit," etc., and the cause was continued to the March Term, 1877. Answer of plaintiff to petition for removal filed March 31, 1877, and cause continued to May Term, 1877. On the first day of May, 1877, said court gave defendant leave to amend his bond. Amended bond filed by Kinney, May 26, 1877, conditioned that "he shall enter in said Circuit Court on the first day of its next session, copies of the process against him in said suit," etc.

At the May Term, 1877, and after amended bond filed, the court made an order for the removal of the said suit to this court.

This court commenced its session on the 3d day of April, 1877. The defendant filed the copy of the record in this court on the 20th of July, 1877, and during the April Term.

The plaintiff files his motion to dismiss the case and remand to the Common Pleas, because

First. A copy of the record of the case was not entered in this court within the time prescribed by the statute after the filing of the petition and bond for removal.

Second. Because the removal of the case to this court is contrary to law, and this court has no jurisdiction.

The statute (Vol. 18, page 471, sec. 3) provides that "when-
ever either party * * * entitled to remove any suit, *
* * shall desire to remove such suit, * * * he, or
they, may make and file a petition in such suit in such State
Court, before or at the term at which the cause could be first

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tried, and before the trial thereof for the removal, * * * and shall make and file therewith a bond * * * for his or their entering in such Circuit Court on the first day of its then next session a copy of the record; * * * and the said copy being entered as aforesaid, * * * the cause shall then proceed," etc.

The first term of the Common Pleas after the filing of the original petition at which the cause could be first tried, was the March Term, 1877. The petition for removal and original bond were in fact filed before the March Term, to-wit: the 24th day of February, 1877.

The record shows that, after the filing of such petition and bond, the suit was continued to the March Term, and at the March Term, to-wit: on the 31st of March, 1877, the plaintiff having filed an answer to the petition for removal, the cause was continued to the May Term. The first day of the then next session of this court, after the petition for removal was filed, being the third day of April, 1877, was allowed to pass without the filing of the record in this court.

Parties seeking to remove causes to the United States Courts are bound to comply strictly with the provisions and conditions prescribed by the statute giving the privilege, and any material omission will be fatal to the removal.

It is clear that if the petition and bond were filed before or at the March Term, then the record must have been filed in this court on the 3d day of April, 1877, if twenty days intervened, and could not be filed afterward.

But it is claimed by the defendant that, the bond first filed being defective, and leave having been given to amend the bond on the first day of May, the petition and bond are to be regarded as filed then, and the proper time to file the record would be at the October session of this court, and, if that be so, then the filing in this court on the 20th of July would comply with the statute.

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The difficulty arising from this claim is that the March Term, being the term at which the case could be first tried, was the latest time at which the petition and bond could be filed. The defendants had no right to do so afterward. The policy of the statute seems to be that parties desiring to remove causes must do so at the earliest period at which the cause could be tried, or they cannot avail themselves of the provisions for removal. In this case the petition and bond having been filed on the 24th of February, the defendant thus early availing himself of the privilege, the limit of the time to file the record in this court commenced to run at that date, and the defendant cannot postpone the filing in this court beyond the time fixed by the statute.

Parties seeking removal must be careful to have the petition and bond in legal form, and in compliance with the statute, when first filed, but if not, they must perfect them within the time prescribed by the statute for such filing.

The subsequent amendment of the bond and the order of the court for removal at the May Term do not change the time at which the petition and bond are required to be filed, so as to allow the limitation to commence to run at that time in reference to the time of filing the record in this court.

The motion is sustained and the case dismissed.

Evans v. Pack.

EVANS v. PACK.

CIRCUIT COURT—EASTERN DISTRICT OF MICHIGAN—OCTOBER
14, 1878.

TRESPASS—STATE COURT—JURISDICTION.

The prosecution of an action of trespass, brought in the State Court against the marshal for seizing goods of another party under execution, cannot be enjoined by the Circuit Court of the United States. It has no such power. The injunction in such case, when issued, is wholly void for want of jurisdiction.

Two motions, one to commit Pack and his attorney, J. D. Turnbull, for violating an order of this court, from further proceeding, etc.; the other to set aside such order.

The bill set forth that Evans, the complainant, recovered a judgment on the law side of this court against Cunningham, Haines & Co.; that execution thereon came to the marshal's hands, who by his deputy, also a complainant, levied upon and sold a quantity of personalty on the premises of the defendants in such execution. Further that this property belonged to said defendants, but that Pack and the other defendants to this suit claiming to be the owners thereof, brought suit in trespass in the Circuit Court of Alpena County against the marshal and Evans to recover the value of the property. It was alleged that the defendants claimed title to said property, through conveyances from Cunningham, Haines & Co., which came through two intermediate parties; that such conveyances were fraudulent, void, and without consideration; and bill prayed to have these set aside and for injunction to stop further proceedings.

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An order restraining the parties named from proceeding was issued; and on the hearing of these motions affidavits were read to the effect that after the service of the order defendants proceeded and obtained judgment against complainant and the deputy for \$5,633.48, damages for taking the property.

Henry M. Duffield and *George V. N. Lothrop*, for complainants.

Alfred Russell, for defendants.

BROWN, J.—This case involves the important question whether this court has jurisdiction to enjoin the prosecution of an action in a state court, against the marshal of this court, for taking the goods of one person upon execution against another. That the possession of the marshal of goods seized under an execution, cannot lawfully be disturbed by an officer of the State Court acting under a writ of replevin or other analogous process, was settled in *Freeman v. Howe*, 24 How. 450—a decision since repeatedly affirmed by the Supreme Court, and universally acquiesced in by the State Courts. It is equally well settled that the State Courts may entertain jurisdiction of an action of trover or trespass against a marshal, for taking the goods of a third party upon a writ of execution. *Buck v. Colbath*, 3 Wall. The substance of these decisions is that, while the possession of the marshal cannot be disturbed, he enjoys no immunity from prosecution in an action for the value of the goods taken.

It is admitted that under the Revised Statutes, sec. 720, the judicial power of the Federal Courts does not extend to the staying of proceedings in a State Court, except in cases arising under the bankrupt act. It is claimed, however, that this section has no application to injunction bills which are

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merely ancillary to suits at law; that every court is bound to protect its officers in the execution of its process; that having first obtained jurisdiction of the case, this court has the right to decide every question arising therein; that the defendants whose property the marshal is alleged to have unlawfully seized, might have applied to this court for a release of the same and obtained full protection of their rights; that having elected to sue in the State Court, which is admitted to have jurisdiction of such suit, the option still remains with this court to allow the suit to proceed or interfere by injunction and withdraw it from the cognizance of the State Court. Certain expressions in the case of *Freeman v. Howe*, seem to support this contention, but these remarks were thrown out by way of *dictum*, and were subsequently criticised in *Buck v. Colbath*, 3 Wallace, 334, 344. All that was decided in *Freeman v. Howe*, was, that property which had been seized by the marshal on an execution from the Federal Court, could not be replevied by a mortgagee or other claimant through the instrumentality of a State Court. In other words, that the marshal was entitled to be protected in his *possession* of the property. The contest related solely to the possession of the goods seized, and there was no necessity of examining into the question how far another court might go in passing upon the title. The court did not even decide that the State Court or the plaintiff therein might be enjoined from prosecuting the suit in replevin, as the case arose upon a writ of error to the Supreme Court of Massachusetts. It is left to inference, however, that the marshal might lawfully resist by force the execution of any process which was designed to wrest from him the possession of the property.

That nothing more was intended by this decision is evident from the subsequent case of *Buck v. Colbath*, 3 Wall. 334, which was also a writ of error to the Supreme Court of

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Minnesota. Colbath sued Buck in one of the courts of Minnesota in an action of trespass for taking goods. Buck pleaded in defense that he was a marshal of the United States, and that, having in his hands a writ of attachment against certain parties, he levied the same upon the goods for the taking of which he was now sued. The court held the action was properly brought. It is true that the marshal in his plea did not aver that the goods belonged to the defendants in the writ of attachment and relied solely upon the fact that he was marshal, and held the goods under the writ. But the case does not seem to have turned upon Buck's failure to plead that the goods seized in fact belonged to the defendants in the execution. Indeed the court remarks that the case was like that of *Freeman v. Howe*, in every particular, with the single exception that, in the earlier case, when the marshal had levied the writ of attachment on certain property, a writ of replevin was issued against him in the State Court and the property taken out of his possession, while in the case then under consideration the officer was sued in trespass for the wrongful seizure. The distinction was clearly drawn in the case between actions which involved the possession of the property, and those which simply sound in damages: "Whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." Again: "It is only while property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect the possession from the process of other courts."

* * * "It is obvious that the action of trespass against

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the marshal in the case before us does not interfere with the principles thus laid down and limited." Speaking of the liabilities of the marshal under a writ of execution the court further remarks: "He is so liable to the plaintiff, to defendant or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he shall exercise that discretion which the law reposes in him, and in no one else."

While the intimation in both these cases is, that the person whose property is wrongfully seized may have redress by petition or bill in equity in this court, it is equally clear he may sue the officer in trespass or trover in the State Court, and that such court may lawfully entertain jurisdiction of the suit; and if the State Court may take jurisdiction, I know of no authority except in cases arising under the bankrupt act which will justify us in interfering with it. This bill clearly falls within the language of section 720, and unless there is something peculiar in the nature of this case which exempts it from the operation of this provision, it must be held conclusive. It is said that the bill is ancillary to the jurisdiction of the Federal Court in the original suit. Perhaps a bill to set aside these conveyances might have been entertained, if filed before the suit was commenced in the State Court; but that court having first obtained jurisdiction of the subject matter, viz.: of the alleged fraudulent transfers, with which the original suit in this court had nothing to do, that jurisdiction is exclusive. I have made diligent search for precedents to sustain injunctions against parties proceeding in State Courts, but have found none except in cases arising under the bankrupt act, and the courts have seemed to assume that no other exception existed. *Diggs v. Wolcott*, 4 Cranch, 179; *Dial v. Reynolds*, 96 U. S.

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340. Had such jurisdiction been supposed to exist, it would certainly have been often invoked.

The restraining order in this case was issued upon the authority of *Kellogg v. Russell*, 11 B. R. 121. In this cause the marshal seized certain property upon a warrant in bankruptcy supposed to belong to the bankrupt, and transferred it to the assignee. A suit having been brought in the State Court against the marshal for such seizure by a party who claimed the property, Judge WOODRUFF entertained a bill against the claimant and the bankrupt, to set aside the transfer as fraudulent, and granted an injunction to restrain the further prosecution of the suit commenced in the State Court. It is true the learned judge does not base his allowance of the injunction on the ground that the suit was in aid of the bankrupt proceedings, and that it was necessary for the bankrupt court in winding up the estate to have entire control of the assets and the power to determine all collateral questions and controversies arising in connection with the estate, but upon a careful examination of the authorities, I am satisfied that this is the only ground upon which the injunction could be sustained. I cannot accept the case as authority for the general proposition that this court may enjoin the prosecution of an action of trespass against the marshal in all classes of cases.

But it is urged that, although this restraining order may have been improperly issued, it was still a mere irregularity, that the court had jurisdiction of the case, and that the defendants were bound to obey it until it had been regularly set aside. Had, then, the court jurisdiction of the case? Had it power to take cognizance of, and decide the case according to the law, and carry its sentence into execution?

It is not always easy to determine whether the defect in a bill is a jurisdictional one or not, and the authorities are not altogether in harmony. Generally speaking, I should say

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that, if the complainant states such facts as preclude the possibility of granting the relief sought against the defendant, the court has no jurisdiction of the case; but if the facts stated tend to make a case the court may lawfully proceed to hear and determine it. The distinction is clearly stated in the case of *The Erie Railway Company v. Ramsay*, 45 N. Y. 637, 644. "Did the learned judge who granted that order have jurisdiction? Had he the power to sit in judgment upon the facts presented to him by the verified complaint in this action, and the affidavits accompanying it, and to judge whether they brought before him a case demanding the interposition of the provisional remedy of an injunction order."

"It must be borne in mind that it matters not whether he judged erroneously as to the necessity or propriety of its interposition, or whether the facts were weak or insufficient. If the allegations contained in the papers before him tended to make a case which, existing, he had the power to enjoin, then he had the power to sit in judgment upon them, and to judge and determine as to their strength or weakness." The statute quoted in this case expressly provides that the court shall not grant an injunction to stay proceedings in a State Court. In other words, on no state of facts which the complainant could present would he be entitled to the relief prayed. What, then, can the court be called upon to hear and determine? In the New York case above cited the court held that there was power of injunction to restrain proceedings in another equitable action in the same court, and, therefore, that the justice had the right to judge between the parties and pass upon the subject; in other words, had jurisdiction of the case, and that Ramsay having disobeyed it was guilty at least of a technical contempt. Applying, however, these general principles to the facts in this case, I feel clear that the restraining order was not merely irregularly or

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improvidently granted, but that it fell within the statute and was, therefore, void.

In several cases where the question of enjoining the action of the State Courts has arisen, the court has used language indicating that it had no jurisdiction of the case. *Diggs v. Wolcott*, 4 Cranch, 179; *Peck v. Genness*, 6 How. 112; *Dial v. Reynolds*, 96 U. S. 340.

The motion made to commit for contempt must be denied and the restraining order vacated.

THE STEAMBOAT CHAS. MORGAN.

DISTRICT COURT—SOUTHERN DISTRICT OF OHIO—
OCTOBER 24, 1878.

1. The wife of a passenger brought a libel *in rem* to recover damages for the death of her husband, caused by the negligence of the officers of the vessel.

2. Plea to the jurisdiction. Jurisdiction sustained.

This was an action *in rem* by the widow of Edwin Rusk against the Steamboat Charles Morgan, to recover damages for the death of her husband. The libel alleged that her husband was a passenger upon said boat from New Orleans to Cincinnati, and that owing to the negligence and carelessness of the master and officers of the boat, in leaving the hatchway open at night, without light and guard, he fell through one of the hatchways into the hold of the vessel and was instantly killed. Prayer for damages. Claimant files a plea to the jurisdiction in the form of exceptions to the libel, on the ground, that in admiralty, as at common law, no action

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is maintainable for the wrongful death of another, either *in personam* or *in rem*.

P. J. Donham, for exception.

Henry Hooper, for libellant.

SWING, J.—From an examination of the English authorities, it is very clear, that no right of action existed at common law for the death of a human being. This doctrine is first announced in the case of *Higgins v. Butcher*, Yelv. 89, which was an action brought by the husband for the death of his wife. Then came the celebrated case of *Baker v. Bolton*, 1 Camp. 493, which was also an action brought by the husband, to recover damages for the death of his wife. These are all the cases we have been able to find prior to the passage of Lord Campbell's Act in 1846. But that this was the recognized doctrine is shown by the preamble of the act, which recites that "whereas no action at law is now maintainable against a person, who, by his wrongful act, neglect or default, may have caused the death of another person," etc., and the act then proceeds by its provisions to give such right of action. This is further shown by the case of *Glaholm v. Barker*, Law Rep. 1 Ch. App. 226, in which Lord Justice TURNER said: "Lord Campbell's Act first introduced into the law of this country a remedy in case of injuries attended with the loss of life. The law up to the time of the passing of this act stood thus, that in case of death resulting from an injury, the remedy for the injury died with the person." The same doctrine is maintained in *Osham v. Gillett*, 8 Exch. 88, and in Bac. Abr. "Master and Servant," O.; *Blake v. Midland Railway Co.*, 18 Q. B. 93. In fact we have not been able to find a single reported case in which a contrary doctrine has been held. The English courts and

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law writers may not have founded this doctrine upon such principles, as may now appear sound to us; but, nevertheless, it cannot be disputed that such was the doctrine of the common law.

In the United States this principle is not so well settled, and yet the weight of authority is to the same effect, as will be seen by reference to the following cases: *Carey v. Berkshire Railroad Co.* and *Skinner v. Housatonic Railway Corp. Co.*, 1 Cush. 475; *Kearney v. Boston & Worcester Railroad Co.*, 9 Id. 109; *Hollenbeck v. Berkshire Railroad Co.*, Id. 480; *Pennsylvania Railroad Co. v. Henderson*, 1 P. F. Smith, 322; *Whitford v. Panama Railroad Co.*, 23 N. Y. 470; *Green v. Hudson Railroad Co.*, 2 Keyes (N. Y.) 294; *Conn. Life Ins. Co. v. N. Y. & N. H. Railroad Co.*, 25 Conn. 265; *Eden v. Lexington Railroad Co.*, 14 B. Mon. 204; *Wenley v. Cin., Ham. & Dayton Railroad Co.*, 1 Handy, 481; *Hyatt v. Adams*, 16 Mich. 180.

On the other hand, there is the case of *Ford v. Charnal*, 20 Wend. 210, in which, however, this question was not made; but it has since been overruled by the New York courts (see cases cited.) The case of *James v. Christy*, 18 Mo. 162, is usually cited as maintaining the opposite doctrine, but it will be found that the decision of the case turned upon a special statute of Missouri. In *Shield v. Younge*, 15 Ga. 349, the question was clearly made and decided, but none of the American cases seem to have been referred to by the learned judge who delivered the opinion of the court. And in *Sullivan v. Union Pacific Railroad Co.*, 3 Dillon C. C. Rep., 334, the circuit judge made a vigorous assault upon the common law doctrine and refused to follow it; but this case was taken to the Supreme Court of the United States, and dismissed for want of jurisdiction, at the October Term, 1877. As no opinion was delivered by the court, we are unable to say whether this point was considered. So that

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there is only the Georgia case, which seems to directly deny the common law doctrine. But that this principle or doctrine, that no such right of action existed, has been generally accepted in the United States, is further shown by the fact that in a large number of the States, such a right of action is expressly given by legislative enactment.

But it is urged on the part of the libellant, that whatever the common law principle may be, that the civil law permitted the action, and that the admiralty courts of the United States are not bound by the decisions of the common law. The decisions of the Federal Courts are not uniform upon this point, although the majority of them sustain it.

In *Plummer v. Webb*, Ware, 69, it would seem that the direct question was not determined, but jurisdiction in admiralty was maintained by the United States district judge. The case was appealed to the Circuit Court, and after amendment of the libel, the action was dismissed by Justice STORY for want of jurisdiction.

In *Crapo v. Allen*, 1 Sprague, 184, it was held that actions in admiralty, for mere personal torts, did not survive the death of the person injured. But in *Cutting v. Seabury*, 1 Sprague, 522, the judge said it was not the settled law, that no action could be maintained for damages occurring upon the death of a human being, and that such right ought to exist; but the precise point was left undecided. It was held in the case of *The Steamship City of Brussels*, 6 Benedict, 370, where a child had died from the negligence of the officers of the vessel, that this action could be maintained *in rem*, as arising upon the contract of passage. And in *The Sea Gull*, Chase's Decisions, 145, Chief Justice CHASE decided that an action *in rem* could be maintained in admiralty by the husband for the death of his wife; and in *The Highland Light*, Id. 150, he affirmed the same doctrine. In the latter case, the widow and son filed their libel *in rem* to

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recover damages for the death of the father and husband, and the same judge held, that while the action could not be maintained *in rem*, the action would lie *in personam*, and that the admiralty court had jurisdiction. This case seems to have been decided wholly upon the construction of the statute; while the former was based entirely upon the general right to maintain such an action in the admiralty court.

In *Coggins v. Mary Helms*, reported in 23 Int. Rev. Rec. 384, it was held in an action by the wife of the chief mate of a schooner, which was run down by a steamship, causing the death of the husband, that an action *in rem* would lie in the admiralty court, to recover damages for his death; following the decision of Chief Justice CHASE. I find, upon reference to the records of this court, that at the June Term, 1870, the District Court dismissed the libel of *Thomas v. Thos. Sherlock et al.*, which sought to recover damages for the death of the husband of libellant, for want of jurisdiction. The case was appealed to the Circuit Court, and by consent of both parties the decree of the District Court was affirmed. There is nothing in the record, however, to show that this point was raised and decided.

So far as I have been able to ascertain, these are all the cases in which the question at issue has been raised and determined. In *The Steamboat Co. v. Chase*, 16 Wall. 522, Justice CLIFFORD discusses the question, and after noticing the cases of *Crapo v. Allen*, 1 Sprague, 184, and *The Sea Gull*, Chase's Dec. 145, adds: "Difficulties, it must be conceded, will attend the solution of this question, but it is not necessary to decide it in this case."

As the case at bar will probably go to the Supreme Court of the United States, it will be better for all parties that the appeal should be taken after a trial upon its merits. I shall therefore overrule the exceptions to the jurisdiction of the court.

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See on same subject and on cognate questions, *The Ruckers*, 4 Robinson's Ad. R., p. 74, and note; *De Lovio v. Boit*, 2 Gall. 399; Domat's Civil Law, 1550; McQueen, 750; *The Sea Gull*, Chase's Decisions, 145; *The Highland Light*, same authority, 150; *Brunswick v. The Sea Gull*, 16 Pitts. L. J. 194. In the last named case, the wife brought a libel *in rem* for damages, alleging that her husband was killed while rowing in Baltimore Bay by reason of a collision with the vessel libelled. The court decided that it had jurisdiction, and that she was entitled to recover. See, also, 6 Ben. 317, and *The Steamship Towanda*, 84 Leg. Int. 374.

The case of *Thomas v. Sherlock* was finally settled by paying the libellant an amount agreed upon between the parties, after which the decree as stated in the opinion, was affirmed. See *The Garland*, reported in this volume, BROWN, J., (February 21, 1881,) holding the doctrine of the text.

See, also, the opinion of DEADY, J., sitting in admiralty for the District of Oregon, in *Holmes, Adm'r, v. Oregon & C. R. R. Co.*, (1880). The libel was for damages, alleging that Perkins, the intestate, was killed through the negligent conduct of defendant, while he was being transported across the Wallamet river to Portland. The case is reported in vol. 5, p. 75, Federal Reporter. The opinion is in accord with those of the other judges referred to herein. See, also, *Gerrity v. The Bark Kate Cann*, Fed. R. vol. 2. [Reporter.

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WILLIAM BRADFORD vs. H. S. BRADFORD, ADM'R,
ET AL.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—NOVEMBER TERM, 1878.

PRACTICE IN CASES WHERE PARTY CANNOT FURNISH PROSECUTION BOND.

A party, who is unable to give security for costs, may, notwithstanding, prosecute his suit if he make an oath that owing to his poverty he is unable to give security, and a respectable attorney shall certify that he has examined the grounds on which it is proposed to bring suit, and is of opinion that it possesses merit, and that the plaintiff is entitled to a recovery.

In this cause, *Wm. S. Flippin* (*G. Gantt* was with him.) moved for an order directing the clerk to issue the necessary process which would enable the plaintiff to commence his action. He stated that plaintiff had some time ago brought suit in this court against the defendants, but, being ruled to give other security, had not been able, owing to his poverty, to do so, and that consequently his cause had been dismissed. He now proposed to renew the suit before the twelve months had expired which the law grants to parties litigant, where their causes have been dismissed for other reasons than trials upon the merits.

BAXTER, J.—There is no statute of the United States requiring plaintiffs prosecuting suits in this court to give bonds for costs. This matter has been regulated by a rule of the court. The rule requires a bond or a deposit of money to secure payment of costs in the event of a non-successful prosecution of the suit. But no provision has

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been made for suits *in forma pauperis*. The applicant, now before us, insists that the statute of the State upon this subject is controlling. We do not concur in this opinion. Section 3192 of the code of Tennessee authorizes any person who will make an affidavit that "owing to his poverty, he is unable to bear the expenses" of the suit he proposes to bring, and that "to the best of his belief," he is "justly entitled to the redress sought," may "commence his action without giving security." The affidavit offered in this case conforms to the requirements of that act. But as already stated, this statute is not imperative upon us. It makes the party proposing to sue, the judge of his right to redress. Such judgment involves the necessity of passing on the law and the facts of the case. Parties are not ordinarily good judges in their own cases. If competent, they may not be impartial. For these reasons we decline to accept the State statute as a rule of this court. But cases may arise possessing merits, in favor of persons too poor to secure costs. For such cases some provision ought to be made. The rule of the English courts adopted and acted on by some of the American courts, commends itself to our judgment as being best calculated to protect this court as well as defendants against frivolous and harrassing litigation. If the applicant will supplement his affidavit by the certificate of any reputable attorney of this court, to the effect that he has investigated the case and believes the applicant has a good cause of action, he will be permitted to bring and prosecute his suit *in forma pauperis*. HAMMOND, J., concurred.

The following order was entered:

WEDNESDAY, February 12, 1879.

WM. BRADFORD, Assignee and Surviving Partner, vs. PHILIP YANCEY, Adm'r of HIRAM S. BRADFORD, Dec'd, ALSEY BRADFORD and ROBERT MORRIS.

In this cause, on motion of plaintiff's attorneys, asking

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leave to bring this suit *in forma pauperis*, the court permits the same to be done on condition that the usual oath required under the State law as to insolvency and poverty be first made, and that attorneys of plaintiff shall certify to the fact that they have examined the facts of the case, and find it possesses merit, and they believe that plaintiffs are entitled to a recovery.

In the admiralty, in cases of persons filing libels being unable to give the required stipulation, it is proper to take an oath like this:

UNITED STATES OF AMERICA, } ss.
 Distr.ct of West Tennessee, }

Cary Southworth, being duly sworn, deposes and says that to the best of his knowledge and belief, the allegations in the foregoing libel are true, and that he is entitled to the redress sought by this suit, to the best of his belief, and that owing to his poverty he is not able to bear the expenses of this suit, nor to give the bond and security required.

[SIGNED]

CARY SOUTHWORTH.

Acknowledgd, subscribed and sworn to by the above named affiant this 4th day of November, in the year of our Lord, eighteen hundred and eighty, before me, at my office, in the city of Memphis, in said district.

H. E. ANDREWS,

Clerk of the U. S. District Court for the Dist. of W. Tenn.

On which the order of the judge follows:

Allow this libel to be filed, upon the plaintiff giving the proper juratory security and taking the requisite oath.

November 4, 1880.

E. S. HAMMOND,

U. S. District Judge.

The following form has been used in the District Court of West Tennessee, for a juratory caution or stipulation. It is believed to contain all that is essential. It must be understood, however, that the judge for said district is expected in all such cases to order the clerk to file the libel before the same shall be actually done, and he refuses in actions of tort to direct attachment to issue against vessels, unless the customary stipulation, with approved security, shall have been given:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
 WESTERN DISTRICT OF TENNESSEE.

CARY SOUTHWORTH AGAINST JOHN D. ADAMS and JAMES LEE,
 JR., owners of Steamboat Ouachita Belle.

In the above named cause, civil and maritime, wherein Cary Southworth is libellant and John D. Adams and Jas. Lee, jr., owners of the

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steamboat Ouachita Belle, are defendants: On this, the 4th day of November, 1880, the said Cary Southworth appeared personally, and stipulated in the sum of two hundred and fifty dollars to prosecute this said cause, and to pay all costs and expenses which may be awarded against him herein by the final decree of this court, and in case of appeal, by the appellate court, and to appear on return day of the process in this cause, and on the 4th Monday of November instant; and the said Cary Southworth makes oath that he will appear on those days and as often thereafter as he shall be ordered by the court, and that he will pay all costs and expenses which may be awarded against him.

[SIGNED]

CARY SOUTHWORTH.

Sworn to and subscribed before me this 4th day of November, 1880.

H. E. ANDREWS,

Clerk.

Judge HAMMOND has obligingly furnished to the reporter the subjoined note:

The strict practice requires, perhaps, that the oath of the libellant to his poverty shall be supported by other proof of the fact, but I find no American rule that requires more than his own affidavit; and this is in analogy to the practice in other courts where the suitor sues *in forma pauperis*. But no doubt, by like analogy, if the oath be false, the adversary party may show that fact, and the privilege of suing without a bond for costs would be denied or revoked. It is said by some of the authorities that the juratory caution is disused in modern practice but acts in relief of an indigent suitor by mitigating his bail or exonerating him wholly from giving it. This has been done, no doubt, by rule in some of the districts, notably by rule No. 143 of the eminent Judge BETTS; but in the absence of a rule to that effect the works on practice seem to require it. Exemption from giving security does not necessarily mean exemption from liability to pay the costs, and the juratory caution only secures by the oath of the party that liability which exists in courts of law and equity, and generally under the statutory regulations permitting poor persons to sue without security. It may be waived, as the ordinary stipulation with sureties may be, by the adversary party's failure to demand it, but that the proper practice requires it seems clear. Whether the party would be liable for costs, as at law, in the absence of the stipulation by juratory caution may be doubtful under the civil law. The very term, juratory caution, means a stipulation by oath without sureties, and, if it be not required, it is a misnomer to call the proceeding by that name. Under the civil law, cautions with respect to the manner in which they were taken, were: *Cautio fide jussoria*, (by sureties); *Pignoratitia*, (by deposit); *Juratoria*, (by oath); *Nude Promissoria*, (bare promise).

Where the suitor was excused from furnishing sureties, he was sometimes required to take the oath of calumny, as were also the attorneys or

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proctors which, besides the averment that the party believed the cause to be just, as is now required in all cases of suing *in forma pauperis*, contained a further averment that the suit was not instituted in malice; but the forms I have found do not contain this averment. In a note to Strahan's translation of Domat's Civil Law, (A. D. 1722,) it is said: "As to what the Roman law directed in relation to caution being given by all plaintiffs and defendants for prosecuting and defending the suit, and paying what should be adjudged, either for damages or expenses, this is strictly observed in the high court of admiralty of England." But according to Coote the requirement of a juratory caution is now limited to suits for wages. The bail required is always £30, and the plaintiff must also give the juratory caution. The form of affidavit requires that he shall swear that he has diligently endeavored, but has not been able, to procure any friend or other person to be bail in the sum demanded; that he is not worth the sum to deposit as security, and is willing to give his own bail. With us it is believed the rule is generally adopted in most districts that the libellant in suits for wages and for salvage, where the salvors have come into port in possession of the property libelled, shall not be required to stipulate for costs. Such is the rule in this district, except that when the defendant comes in, if he shows that the libellant is able to give bond, the court will require it as in other cases.

Practically, it is, perhaps, of small importance whether a really indigent suitor gives the juratory caution or not; and it may be that irrespective of the rules of the civil law on the subject, there would always be, under our common law jurisprudence, an implied *assumpsit* to pay, at least his own costs, in all cases; but the privilege of suing as a poor person does not imply absolute exemption from liability to pay all costs, and as there is danger of imposition by parties able to pay who seek a refuge from the liability by appealing to this indulgence, it is well enough, it seems to me, to follow the strict practice and take the juratory caution in all cases. It is presumed that the civil or admiralty law originally demanded in the juratory caution nothing more than the security of the parties' oath, but in some modifications of it in the Scotch courts, and perhaps elsewhere, the court requires an inventory under oath of the suitor's effects, and these are assigned in security of the sums which the court may decree. It is possible this applies only to that class of stipulations required of a defendant or of a plaintiff to pay damages and not to mere stipulations for costs or expenses of the suit. It seems that the civil law is more cautious and protective in these matters of stipulations to secure parties than the common law.

Consult the following authorities: Benedict Ad. 206; Conk. Pr. 463; 2 Conk. Ad. 585 (2d ed.); Id. 119, 199; 2 Pars. Ad. (Ed. 1859), 697, 729; 2 Pars. Ship. & Ad. (Ed. 1869), 417, 479; Betts Ad. (Ed. 1838), 27; Id., Appendix, 433; Cootes' Ad. 52, 252; 1 Browne Civ. & Ad. L. 361; 2 Id. 357,

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411; Clerke's Praxis, tit. 11, 13, 14; 1 Domat, (Strahan Ed. 1722) 393, title *Cautions*, Book 3, tit. 4; Bouv. Dic. (Ed. 1870), words *Caution*, *Caution Juratory*, *Juratory Caution*, *Juramentum Calumniæ*; *Polydore v. Prince*, 1 Ware, 402; *The Edwin*, 3 Hagg. 406; Annotated Rules Mich. Dist., Rule 9, cites *The Sophie*, 1 Wm. Rob. 326; *The Volant*, Id. 383; *The Franz & Elize*, Lush. Ad. 377; *The Peri*, Id. 543; *The Wild Ranger*, Id. 553; *The Mary*, 1 Ad. 335; *The Great Britain*, Olc. 1; *Polydore v. Prince*, *supra*; *The Arctic*, 1 Brown, 347. [Reporter.

 WISDOM vs. CITY OF MEMPHIS.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—NOVEMBER TERM, 1878.

PRACTICE OF FEDERAL COURTS IN MANDAMUS CASES.

1. Where writs of *mandamus* are resorted to for the purpose of compelling a municipal corporation to levy a tax, this court will conform as much as possible to the State practice in similar cases.

2. Unless special circumstances should require it, a peremptory writ will not be issued, commanding a levy of taxes to pay a judgment against a municipal corporation at a time different from the next general levy.

HAMMOND, J.—The writ of *mandamus* at common law issued out of the Court of King's Bench, and could only be applied for in term time, but was returnable before the court at any time to be fixed by the court, in its sound discretion, to suit the exigencies of the particular case. In Tennessee the practice is regulated by statute, and under the act of 1831, Code 3567, it has been the practice of the judges authorized to issue the writ, upon a petition being presented, duly verified, to grant in vacation a fiat for the alternative writ returnable to the next term of the court. This alternative writ is in the nature of an order

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to show cause, and if on the return day no cause is shown against it, the peremptory writ issues, commanding the act to be done. While the Federal courts have no general jurisdiction, like the Court of Queen's Bench, or of the Circuit Courts of the State, to issue writs of *mandamus* for all purposes where applicable at common law or under the State statutes, they do have power to use them when necessary to enforce jurisdiction already acquired, and it is auxiliary to their general jurisdiction. One of the most frequent uses to which the writ is put, is to compel a municipal corporation to levy a tax authorized by law to pay a debt on which a judgment has been rendered in this court. When used for that purpose, we think we are not only authorized, but required by the act of Congress making the practice in the State and Federal courts uniform, to conform as much as possible to the State practice in similar cases.

We shall, therefore, on a proper petition filed and verified, either in vacation or term time, direct the alternative writ to issue, returnable to the next succeeding term of the court, or to some day of the same term, as the case may require, giving reasonable notice to the defendant corporation to show cause why a peremptory writ shall not issue. If no sufficient cause is shown, or default is made, the peremptory writ will command the corporation to levy the tax on or before the time of its next annual levy, as required by the law governing it in levying taxes for like or general purposes, and returnable accordingly. We do not doubt the power of the court in a proper case to compel a special levy of the tax to pay the judgment, at a time different from the general levy; such, for instance, as the disobedience of a peremptory writ, or some other special circumstance requiring such a course. In this case we do not think the plaintiff is without fault in failing to have had the tax levied at the last annual levy. It is undoubtedly true that it is the duty of the city to obey the

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alternative writ, and not put plaintiff to the expense or delay of a peremptory writ; but if it fails to do so, like any other debtor it can only be compelled by the ordinary course of legal process to discharge the duty. The application for a special levy is denied, and the peremptory writ will issue, commanding the city to levy a tax to pay this judgment at its regular levy, and that it make such levy on or before the 15th day of next July, and certify the said levy to the proper officers for collection as required by law, and that said writ be returnable to the next November term of this court thereafter.

We have taken this occasion to define and regulate the practice which will govern us hereafter in the ordinary course of business in cases like this, with the reservation that the discretion of the court will be exercised to accommodate the remedy to the exigencies of any extraordinary case which may arise, according to the rights of the parties and the justice of the case.

BAXTER, J., concurred.

Rule is now, in the first instance, to show cause why peremptory mandamus shall not issue; so made because of the indisposition of parties to make levies. [*Reporter.*]

Mattingly v. 357 Bales Cotton.

MATTINGLY v. 357 BALES OF COTTON.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
NOVEMBER TERM, 1878.

SALVAGE.

1. SALVAGE COMPENSATION.—Where the District Court allowed one-third of the value of a cargo for salvage services which did not consume more than, or a little more than, half an hour's time of a tug, it was set aside on appeal on the ground of its being exorbitant and excessive; the amount of \$750 being deemed reasonable, which sum was adjudged to the salvors.

2. RULE ON HIGH SEAS NOT SAME AS ON RIVERS.—Salvage compensation in cases arising on the high seas cannot be safely followed in cases arising on the western rivers, as the peril of life is generally much less.

This was an appeal from the District Court.

The steamer Mary Bell, at 2 P. M. of the 27th day of February, 1876, while lying at the levee, Vicksburg, Mississippi, was found to be on fire. She was loading cotton. Two steamers were near her. On her larboard was the Yazoo Belle, and on her starboard side lay the Tallahatchie, both partially laden with cotton. The tug John Bigley, seeing the danger, immediately came up and towed first to a place of safety the Yazoo Belle, and, returning, drew off the Tallahatchie. The time required to place the latter beyond reach of the fire occupied from five to ten minutes; to land her above the burning boat, in all, about half an hour. There was no other tug in port. One or more persons belonging to the crews of the Yazoo and Tallahatchie rendered some service. The owners of the tug, one of whom aided, and the crew of the tug who were not required to leave it during the whole time of service, are the libellants in this

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suit. Libellants dismissed their suit as to 119 bales of cotton, which it was shown were not on board the Tallahatchie at the time of service; 342 bales were actually seized under process.

Libellants were awarded salvage at the rate of \$10.79 per bale in the District Court; the cotton being valued at \$32.51 per bale, with interest, from which an appeal was presented.

J. M. Gregory, for libellants.

T. B. Turley and *H. C. Warinner*, for claimant.

BAXTER, J.—The claimants have appealed to this court and here complain of the decree below as awarding an excessive compensation in salvage. I cannot concur with the District Court in the amount allowed. Upon the statement of the case as presented by the proctor for libellants, I think the sum of seven hundred and fifty dollars most ample compensation in the way of salvage. Indeed, I think five hundred dollars would be liberal; but I fix it at seven hundred and fifty dollars to cover interest. There is no doubt in my mind but that, if libellants had been called upon to do the work at a stated price, they would have gladly undertaken it for one hundred dollars. Their own proof shows that the ordinary compensation charged by the tug for towage was ten dollars per hour. I cannot consent to adopt the rule, which seems to have grown up among some of the courts, exercising maritime jurisdiction over the western rivers, of allowing such large awards of salvage:

The learned counsel for the libellants insists that upon the principles laid down in the text-books, and under the precedents established, the amount allowed below, being about one-third the value of the cotton, is not excessive. I cannot adopt this view. In former years such services as these, requiring but little time and labor, were rendered by steam-

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boats on the rivers as acts of courtesy to each other, without any demand for compensation. But beyond this, "in salvage claims arising on the western rivers, the precedents of courts administering the admiralty law of the ocean in regard to the *amount* of compensation, cannot be safely adopted, because the peril of life is generally much less." *Str. Pontiac*, 5 McLean, 359-368. This principle I most cordially approve; and while it may be true that in the multiplicity of courts and judges having salvage causes before them, some of them have been disposed to adopt and apply, in large degree, the theory of compensation recognized in ocean salvage; still, for myself, I am wholly unwilling to countenance or continue such extreme liberality in the exercise of my judicial discretion. In this circuit over which I am required to preside, and so long as I occupy my present position, I shall be careful to guard the property of suitors, whether they be insurance companies or general owners, against what seem to me to be excessive or extortionate demands; and in the expression of the judicial discretion vested in me under the law, I shall make for this circuit such precedents in the matter of salvage allowance as seem to me just and proper according to the circumstances of each case.

There are no facts presented in this record justifying a larger allowance than that I have fixed. The danger of peril to the tug and her crew, alleged in behalf of the salvors, and mentioned in their testimony, was more fanciful than real, and could, at any moment, have been withdrawn from and escaped. The time occupied in the rendition of the service was very short, and these elements, taken in connection with the other circumstances surrounding the transaction, lead me to the conclusion that the allowance of the gross sum of seven hundred and fifty dollars, instead of a *pro rata* per bale, or on the entire value of the property saved, is the proper amount to be awarded as salvage in this

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cause. But I adjudge this amount free of all costs, and direct the whole of the costs in the District Court and in this court to be taxed against the claimants.

The decree of the District Court is, therefore, reversed and modified as indicated in the opinion, and the decree will be entered accordingly.

THE FRANK MOFFAT.

DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—NOVEMBER TERM, 1878.

TOWING—COLLISION—EVIDENCE—LACHES.

1. Where a collision occurred between a propeller that was aground on the St. Clair Flats and a tow that was bound up, the propeller was condemned for not exhibiting a proper light and the tug because it failed to stop. The schooner that was towed was adjudged faultless.

2. THE RELATION BETWEEN TUG AND TOW.—Looking to the business of towing as ordinarily conducted upon the lakes, the relation between the tug and the vessel towed is that of master and servant. The tug furnishes her own crew, regulates the length of the line and the movements of the vessels, the order in which the tow shall be made up, and determines the number of the tow, irrespective of the wishes of the master of the vessel towed. Each vessel is liable to third parties for her own negligence; no further, but in certain events they may be jointly liable.

3. Where there has been no change of ownership the libellant is not debarred of his action if he commence his suit within the time prescribed by the statute of limitations; and there is no laches because two year's time has elapsed since the collision.

4. THE CONFLICT OF EVIDENCE.—The general rule, that where there is a conflict of evidence with regard to what has taken place upon a vessel, the testimony of her own master and crew shall be believed in preference to that of an equal number of witnesses observing her movements from another vessel, does not apply to the exhibition of a light.

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The propeller Colorado, while on a trip from Buffalo to Chicago ran aground on the north bank of St. Clair river, at about 8 p. m., on the 15th of November, 1873. This was in a bend or bayou of the channel, at some distance from the range of lights on the flats to the place where the ship canal enters. Lying there with her stern out slightly in the channel, and though having a space of between 300 to 600 feet on her starboard side, she was run into by the tug Frank Moffat while ascending the river, having in tow the schooner Sunrise, at about 4 a. m. of the morning of November 16. When the tug struck the Colorado she drew along upon that vessel the Sunrise, which also struck the propeller on her port quarter, inflicting serious damages. The collision was brought about by the negligence of the tug, for if she had ported at a proper distance she would have safely passed. The tug endeavored to fasten the blame on the propeller; insisting that she displayed no light.

F. H. Canfield, for libellant.

Geo. E. Halliday, for respondent.

BROWN, J.—I am satisfied there is no fault to be imputed to the schooner. The line connecting her with the tug was only 120 to 125 feet in length, and as the tug did not check until very close to the propeller, the utmost vigilance and activity on the part of the schooner in porting, would not have enabled her to clear the propeller. There is no evidence that any warning was given by the tug, although the mate swears that he thinks he told the watchman to go and sing out to them. With a longer line and with an earlier observation of the propeller on the part of the tug, the schooner might have ported in time to avoid her, but, under the circumstances of the case, it was obviously impossible.

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It is also claimed that the tug was acting simply as the agent of the schooner, and that the schooner is solely responsible for the negligence of the tug. There are a number of English cases cited, as lending countenance to this doctrine, but upon a careful examination, I find they do not sustain it to the extent claimed. In *The Duke of Sussex*, 1 W. Rob. 270, the action was brought against a tug for damage occasioned by the vessel in tow colliding with another vessel. It was held that the vessel in tow, having a licensed pilot on board, and no error or negligence being established on the part of the crew of the tug, she could not be held liable. Following the general rule in England, that a vessel is not liable for a collision occasioned by the act of a licensed pilot, it was held that as the steam tug only executed the orders of a pilot on board the vessel, and was guilty herself of no negligence, she could not be held responsible. To the same effect is *The Duke of Manchester*, 2 W. Rob. 470. In *The Gypsy King*, 2 W. Rob. 542, Dr. LUSHINGTON states the English law as follows: "Now I have, upon former occasions, already expressed my opinion, that a vessel in charge of a licensed pilot, whilst in tow of a steam tug, is, under ordinary circumstances, to be considered as navigated by the pilot in charge; that if the course pursued by the steam tug is in conformity with his directions, and a collision takes place, the pilot is responsible, and not the owner of the vessel or of the steam tug. If, on the contrary, the steamer disregard the directions of the pilot, and the collision was occasioned by her misconduct, the owners of the ship would, in that case, be responsible in this court, as for the act of their servant; and they must seek their redress against the owner of the steam tug in some other action."

There is no case, however, even in England, holding directly that a steam tug, controlled by her own officers and men, would not be liable if she herself were guilty of negli-

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gence in bringing about the collision. In the case of *Smith v. The Creole*, 2 Wall. Jr. 485, the principal American case supposed to support the English doctrine, Mr. Justice GRIER observed, "When canalboats or other like vessels are towed by steamboats, it is usually under a contract which puts the towed vessel wholly under the direction and control of the officers of the steamboat. In such cases the steamboat would be liable for any collision occasioned by the negligence or want of skill of her officers, but when the steam power has been hired to tow larger vessels in or out of port, the contract is different, and creates a different state of responsibility. The towboat in such case, is the servant of the ship, and in the exercise of its physical power, is bound to obey the orders of the master or pilot who has command or control of the ship. If the towboat obeys the directions of the pilot or the master of the vessel, he is responsible for the consequences. If the ship is brought into collision with another vessel, by the unskillfulness or disobedience of orders of the officers or hands on the towboat, its owners are liable to the owners of the vessel or person who employed them, but not to third parties."

I think this and later cases, holding the principal responsible instead of the servant, proceed upon the hypothesis that the negligent act on the part of the tug was committed in obedience to orders from the officers of the ship, and are not founded upon the *general* relation between them of master and servant.

The rule which governs this case is laid down in *Sturgis v. Boyer*, 24 How. 123, and repeated in *The Maria Martin*, 12 Wallace, 44, in the following language: "Where the officers and crew of the tow, as well as the officers and crew of the tug participate in the navigation of the vessel, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly, may be liable for the consequences,

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according to the circumstances, as the one or the other or both jointly were either deficient in skill, or culpably inattentive or negligent in the performance of their duties. See also the ship *John Frazer*, 21 How. 184; *Sproul v. Hemingway*, 14 Pick. 1; *The Belknap*, 2 Low. 281.

As the business of towing is conducted upon the lakes, I regard the relation between the tow and the tug as that of master and servant. The tug engages usually for a lump sum, to tow the vessel from one point to another. She furnishes her own crew, pursues her own course, regulates the length of the line, the movements of the vessels, the order in which the tow shall be made up, and determines the number of the tow, usually irrespective of the wishes of the master of the vessel. It is true, the vessel in tow has certain duties also to perform, she must keep a careful lookout, follow in the wake of the tug, have her lights properly burning at night, and do all she can to avoid a collision in case of danger. In the performance of these services, the tug is plainly a contractor within the definition of that word. *Sherman and Redfield on Negligence*, sec. 87. In such cases each party is responsible for his own negligence. If, by the negligence of the tug, the tow is drawn off her course, the tug is responsible. If, by the negligence of the vessel she sheers out of her course, she is alone liable. It is a case where both participate in the movements of the tow, and both are concerned in its direction. I think all of the cases where the tug has been exonerated, have been those where the act of negligence committed by her was in obedience to an order given by an officer in charge of the vessel. In such case the vessel would clearly be liable and the tug exonerated.

The objection that the lien has been lost by the laches of the libellant, in failing to bring his action within a reasonable time, is untenable. The collision occurred the 16th of November, 1873, and the action was commenced on the 10th

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of November, 1875; about two years after the cause of action arose. Had the tug in the meantime been sold and passed into the hands of a *bona fide* purchaser, without notice of this claim, I should have held the lien lost. But where no change of ownership has taken place, I see no reason why the libellant should be debarred of his action if he commence his suit within the time prescribed by the Statute of Limitations.

The liability of the propeller depends solely upon the question whether she was exhibiting a proper light at the time of the collision. On the one hand her crew swear that the usual anchor light was displayed upon the flagstaff, and that there was also a globe lantern standing upon the companion way in such a position that it could be seen by a vessel approaching from behind; but their testimony is not of the most trustworthy nature, as all but one man seems to have been below at the time of the collision. On the other hand, the master, mate, lookout, and engineer of the tug, all swear that no light was displayed; and two of them, at least, saw the propeller at some distance; were intently watching her to find out what she was, and would certainly have seen a light if it had been exhibited. I do not think the general rule, that when there is a conflict of evidence with regard to what has taken place upon a vessel, the testimony of her own master and crew shall be believed in preference to that of an equal number of witnesses observing her movements from another vessel, applies to the exhibition of a light. This is a matter about which none of the crew can speak with any certainty, except those who were on deck, and even they might very easily overlook the extinguishment of a light, while the crew of an approaching vessel, keeping a proper lookout, could hardly fail to discern a light, if one is exhibited. The night of the collision was a cold one, and I deem it not at all improbable that the oil might have become

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congealed and the light either have been extinguished or become so dim it could be seen but a short distance off. There is also evidence tending strongly to show that, after the collision occurred, a light was run up on the flagstaff of the propeller—a thing which would probably not have been done had there been a sufficient one already. At the time of the collision, there was also complaint made by the crew of the tug to the master of the propeller, that she was lying there without a light, and some one remarked that it was a pretty time of night to put up a light. Upon the whole, I think the evidence preponderates in favor of the theory that the propeller was not exhibiting a proper light at the time of the collision. While the absence of such a light in a bright moonlight night would probably not have occasioned a collision, considering that the night was a dark one, though not cloudy, I cannot say it did not contribute to the collision in this case. Indeed, I think it very improbable that it would have occurred if a proper light had been exhibited. A fault proven to have been committed is presumed to have contributed to the collision, and the want of a proper light has always been considered a fault of the gravest description. I think it should require a clear case to satisfy the court that it did not aid in bringing it about. *The Thomas Sea*, 3 Asp. Mar. Law Cases, 260; *The Victoria*, 3 W. Rob. 49; *The Saxonia*, Lush. 410; *The Olivia*, Lush. 497; *The Indiana*, Abbott, Admiralty, 330; *The St. Charles*, 19 Howard, 108; *The Osprey*, 2 Wallace, C. C. 268; *Nelson v. Leland*, 22 Howard, 55; *The Ariadne*, 13 Wall. 475; 1 Parsons on Shipping, 550. I must therefore hold the propeller to have been in fault.

I think the tug was also clearly in fault. The evidence is uncontradicted that the propeller was seen some time before the collision occurred. The mate says: "I could see something looming up before me in the dark. That is the first

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intimation I had of it. I called the watchman's attention to it and he said it looked like the broadside of a barn. Then I saw we were getting pretty close to her, and checked her down and stopped her; put my wheel a-starboard. I saw it was my only chance of not striking her. I took it to be a small vessel of some kind, I did not know what. I was so close to her I saw it was the only thing I could do. * * * Not more than half a minute elapsed from the time I saw the Colorado to the time I checked the speed of the tug; may be not that long. If I had known that it was a propeller, I don't know that there was anything to prevent me from porting my wheel, and clearing her, but I did not have my lights ranged and could not tell, and so I starboarded my wheel. If that had been a vessel sailing up the river I would have put my wheel to starboard."

John Hiller, the watchman, says, p. 38, Mr. Edwards called my attention to this black spot, or something dark, it looked to him, and asked me if I knew what it was, and I supposed it to be, when I first saw it, a bunch of rushes. I passed some queer remark about it; said it looked like the side of a barn or something in a joking way, and I stood forward with him; in a few minutes our light shone on the propeller's stern so we could see it, it looked like a sail, the stern did, to me. Mr. Edwards checked the boat down immediately and I made the remark that I thought it was a small boat, a fishing boat or yacht of some kind; it looked like a small sail. Mr. Edwards checked the boat down and put his wheel starboard, and stopped her soon after he checked her, * * * I don't think she could have been more than 100 or 150 feet from the propeller when she was checked down, probably further; I could not say exactly."

John Thomas, the engineer, says: "My first knowledge was a bell rung and I got out of bed to see what was the matter, as I usually do when we go over the flats. I looked

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out and I could not see anything but a white glimmer, which I thought was a sail, so we checked the engine back very slow. I told the second, he was standing by the engine, to check her slow, and by and by we got a bell to stop, and by that time we ran alongside. * * * It could not have been a very long time after we got the bells to check before we got the bell to stop; I could not tell exactly. It might have been half a minute or it might have been close on a minute for aught I know."

The master of the propeller testifies that the propeller could have been seen three or four lengths of herself without lights. To the same effect is the testimony of the first engineer.

I think it evident from this testimony, that the mate and lookout of the tug must have discovered the propeller very soon after passing the range lights at the bend, and at a distance of from 800 to 1,000 feet. Failing to discover exactly what it was, and mistaking it, perhaps, for a bunch of rushes, it was nevertheless incumbent upon them at once to stop until its character had been determined. If a steamer makes an object or hears a hail ahead of her, the character or position of which the officers are unable to fix, it is their duty to stop until the doubt is resolved. *The Hypodame*, 6 Wal. 216. She has no right to plunge blindly forward and encounter dangers, the magnitude of which she is unable to discern. This applies with even greater force to a tug, since she is unable to back or to use any extraordinary efforts to avoid a collision, without endangering a collision between herself and her tow.

I think it quite probable there may have been a mistake in the range lights at the head of the canal, and that not only the starboarding of the tug, but the grounding of the propeller may be attributed to that. Although it is denied by the officers of the propeller, it is perhaps the most probable

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solution of her getting aground, and of the otherwise inexplicable movement of the tug. But the question of fault does not hinge upon this. It was the duty of the tug at once to stop when she made out the dark object ahead of her. Instead of this, she kept on for some considerable time, and apparently did not even check until the lights of the tug reflected back from the stern of the propeller, developed the fact that it was a vessel. The tug then first checked. Even then, prompt porting might have avoided the collision. Certainly the tug cannot claim the excuse of a wrong order given in a moment of imminent peril, since by her negligence in failing to stop, she had brought herself into that predicament. There must be a decree apportioning the damages, and referring it to a commissioner to assess and report the same.

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A. H. H. DAWSON v. RICHARD C. DANIEL.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
NOVEMBER TERM, 1878.

1. JUDGMENT OF ANOTHER STATE SUED ON HERE.—The judgments of other States are conclusive when sued on here, and this court cannot for any purpose look to the merits, even where it may have been an illegal contract.

2. JUDGMENT BY DEFAULT—WHEN SET ASIDE.—Judgment by default will not be set aside, unless the defendant can show that he was guilty of no negligence in suffering the judgment, and has a meritorious defense.

3. THE RULE AS TO A STAY OF PROCEEDINGS WHERE JUDGMENT HAS BEEN RENDERED IN ANOTHER STATE AND SUIT BROUGHT HERE UPON IT.—If the plaintiff can get no execution on his judgment in the other State, by reason of a supersedeas, the court may well be asked here to stay proceedings, unless it appears to have been a useless appeal or writ of error, in which case the stay may be refused. The rule in England and here is the same, which is not to stay proceedings where a suit is brought upon a judgment, unless that judgment has been appealed from and a supersedeas has been procured.

4. The practice in England and America as to stay of executions and suits on judgments, fully discussed.

Dawson obtained judgment against Daniel in New York, from which appeal was taken but no supersedeas of execution was procured. Suit was brought on this judgment in the Circuit Court of United States, at Memphis, and on account of some oversight or misapprehension of counsel, judgment was taken by default; the evidence offered being a duly exemplified copy of the New York judgment. Defendant thereupon offered affidavits and moved to vacate such judgment and for a stay of proceedings, alleging that it was obtained on account of an oversight or misapprehension of counsel, who understood they had further time to

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plead; that there were merits in the defense; that Dawson was insolvent, and if the judgment were permitted to stand, and the New York court should reverse it on the appeal they would be remediless; and that it was in the discretion of the court here to interpose a stay of proceedings until the appeal was disposed of in New York.

Geo. Gantt and Wm. S. Flippin for, and

Humes & Poston, against the motion.

HAMMOND, J.—This is a motion to set aside a judgment by default taken last term but continued over by this motion till now. Judgments by default will not be set aside, unless the defendant can show that he was guilty of no negligence in suffering the judgment and has a meritorious defense. Otherwise, the process of the court requiring parties to appear and answer suit goes for naught, and the court is the victim of the caprices of parties. Freeman on Judgments, Sections 102, 108, 541. *M. & O. R. R. v. Dowd*, 9 Heisk. 178; *Chester v. Apperson*, 4 Heisk. 639.

The judgments of other States are conclusive when sued on here, and this court cannot look to the merits for any purpose, not even where it may have been on an illegal contract. *Hunt v. Lyle*, 8 Yerg. 142; Freeman on Judgments, Sections 433, 575, 576; *Eastman v. Jones*, 2 Yerg. 484.

The only merits insisted on here is that a writ of error has been prosecuted in New York to the judgment, and it is said, Dawson being insolvent, this court will exercise a discretion and stay further proceedings to await the result of the writ of error.

It is conceded that the writ of error, as taken, does not supersede execution, but it is insisted this court has discretion, notwithstanding, to stay proceedings. If bail bond had

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been given in New York the judgment there would have been superseded. N. Y. Code, 1871, Sections 335, 348.

In England, a suit upon a judgment was not favored for the reason that it was vexatious, inasmuch as the plaintiff could have his execution on the original judgment. *Entwistle v. Shepherd*, 2 Term, 78. Yet, the right of suit was undeniable, and this notwithstanding a writ of error was pending. 7 Vin. Ab. 351, 352; 20 Id. 67; 110 E. C. ch. 11. It is obvious the rule of disfavor to such suits in England does not apply to suits on foreign judgments or to suits from other States in this country. Where a writ of error has been sued out and bail bond given, it operates as a supersedeas in England, as it does here and in New York. In those cases only, so far as I can find, did the court ever stay proceedings in a suit upon the judgment, where bail had been put in and *fi. fa.* was stayed. It was in the discretion of the court to do this or not, and it was generally controlled by the fact, whether the writ of error was for delay or not. If it was a litigated case, the court looked with disfavor on the second suit. If it was a writ of error for delay merely, the court would favor the second suit and not stay proceedings. The rule to stay proceedings could not be had till bail was put in, which shows conclusively that the proceedings would not be stayed, unless the execution had been superseded and the plaintiff was protected against delay by bond. 3 Bac. Ab. 356; 9 Id. 284; *Meriton v. Stephens*, Willes R. 277; *Entwistle v. Shepherd*, 2 Term R. 78; *Christie v. Richardson*, 3 Id. 78; *Pool v. Charnock*, Id. 78; *Benwell v. Blank*, Id. 643; *Smith v. Shepherd*, 5 Id. 9; *Bicknell v. Langstaff*, 6 Id. 455. The American rule is the same, and it is a just rule; it is the logical result of the requirement that we shall treat the judgments of another State as conclusive. But if the plaintiff can get no execution there, by reason of a supersedeas, the court here may well be asked to stay pro-

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ceedings, unless it appears to have been a useless and vexatious appeal or writ of error, in which case the stay might be refused. *Taylor v. Shaw*, 39 Cal. 536, and other cases cited; Freeman Judg. sec. 433, 576, 602; *Suydam v. Hoyt*, 1 Dutch. 232.

Motion denied.

There is one question not passed upon by the learned judge, which occurs to the mind in reading the foregoing opinion, and that is the propriety of adjourning from court to court motions for new trials. It was not necessary to the decision of the motion in this cause, and hence was passed over. It may be well to state in this connection that this motion was adjourned over by the predecessor of Judge HAMMOND. The practice of so adjourning motions seems to have obtained in Missouri and Tennessee, to some extent, but is believed to be seldom practiced in other States. It is not recognized in England, and not favored at all in many of the States. Its adoption opens the door to making other testimony, much to the prejudice of one party or the other, and there are other inconveniences which readily occur to the mind of the reader. It may be safely affirmed that the great weight of authority is against the practice, and there is nothing to be said in its favor. See Freeman on Judgments, Sections 90 and 96. [*Reporter*.

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A. H. H. DAWSON vs. RICHARD C. DANIEL.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—NOVEMBER TERM, 1878.

1. EXECUTION is not void because it issues prematurely. If issued while motion for a new trial stands adjourned, the irregularity is cured as soon as such motion is denied, and this is especially so where the order of adjournment provided that the same was granted, without prejudice to plaintiff.

2. SEMBLE.—That the proper practice to prevent the issuance of an execution, where motion for a new trial is not disposed of, is to ask and obtain stay of execution.

3. WATCHMAN.—His withdrawal by levying officer no abandonment of levy. His presence not necessary to hold title.

4. WHAT CONSTITUTES AN ABANDONMENT.—To constitute an abandonment of a right secured, there must be a clear, unequivocal and decisive act of the party; an act done, which shows a determination in the individual not to have a benefit which is designed for him.

Humes & Poston, for plaintiff.

Geo. Gantt and Wm. S. Flippin, for defendant.

L. D. McKissick, for the Bank.

HAMMOND, J.—The plaintiff recovered judgment by default, against the defendant, on the 6th day of June, 1878, for \$2,610.69 and costs. At the same term, and on the 13th day of June, 1878, the defendant moved to set the judgment aside, and for leave to plead; whereupon the court made the following order: "In this cause the application of defendant to vacate the judgment rendered herein at the present term of this court, is continued to the next term of the court without prejudice to either party."

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After the adjournment of the term, and on the 5th day of July, 1878, execution issued on this judgment, which, coming into the hands of the marshal, was, by him, on the 9th day of July, 1878, levied on certain leasehold property belonging to the defendant, and it was advertised for sale. The marshal indorsed his levy on the writ at the time he made it, but, on the 17th day of August, 1878, returned it into court, with the following indorsement annexed to that on the levy. "And on the 17th of August, 1878, in obedience to an order of court, issued by Hon. John Baxter, I return this writ without further proceedings thereunder."

The plaintiff now moves for a *venditioni exponas* to compel a sale of the property. The defendant resists the motion on two grounds: First, that the execution prematurely issued, and is void; and, secondly, that the levy has been abandoned by the marshal. It appears by the affidavits filed, that the marshal, when he made the levy, placed a watchman in charge of the property, and when he returned the writ, he withdrew him, and left the property as it was before.

The letter of the circuit judge to the clerk of the court, dated Knoxville, August 5, 1878, and his letter of the same date to Messrs. Gantt & Patterson, attorneys for defendant, transmitting the letter to the clerk to them, are offered in evidence by defendant, in opposition to the motion, and are relied upon, together with the recalling the execution, and as evidence of an abandonment by the marshal of the levy, and also as evidence of an adjudication by the circuit judge of the questions involved in the motion.

If I supposed the action of the circuit judge was intended to be a decision of the rights of the parties, I should certainly enforce it by my judgment on this motion, whatever my own opinion might be. But it is apparent that it was not so intended, and could not have been. It does not purport to be an adjudication at all; certainly not upon the right of

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property as affected by the levy, but only a letter of advice to the clerk. He says to the clerk: "My suggestion is that you issue a paper to the marshal, reciting the fact that the executions were issued without authority, and request him to return the same unexecuted." In the letter to the attorneys, after suggesting to them that the application made to him is informal and unknown to the practice of the court, he expresses the opinion that the executions issued prematurely and should be recalled, and that the clerk and marshal may possibly be liable for any action they have taken; but it seems to me he carefully avoids doing anything more than to suggest to those officers that under the circumstances, they should proceed no further. By no possible construction can this be construed into an adjudication that because the execution was prematurely issued the levy was void, nor could he have intended that the clerk and marshal should personally have assumed the responsibility of an abandonment of the levy. It is not even an adjudication that the execution was prematurely issued, but simply a suggestion of a mode by which this and all other questions involved might be adjourned into the court for its determination, when all parties should be present; and he distinctly declines to determine the question as an *ex parte* application, such as was made to him.

At this present term of the court, the motion of the defendant to vacate the judgment was heard and overruled, and now the question is whether or not a *venditioni exponas* shall issue.

It may be assumed that the execution did issue prematurely, but unless that fact rendered it void, the levy is good. Did it have that effect? In the case of *Hapgood v. Goddard*, 20 Vt. 401, it is said by the court that "ordinarily courts of law refuse to set aside executions when that, and that only

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has been done which is required to be done now, although done prematurely?"

In the case of *Stephens v. Brown*, 56 Mo. 28, cited by defendant's counsel, and in Freeman on Executions, Secs, 24, 25, on the point that it is error to issue execution before a motion for a new trial is determined, we find a precedent for this case. The defendant in that case filed a motion for a new trial, which was continued under advisement till the next term, and in the meantime execution issued, and the plaintiff was put in possession of the land. At the next term the motion for a new trial was overruled. He filed a motion to quash the execution, because prematurely issued, and that was overruled. The defendant appealed, and the Supreme Court of Missouri say: "It was erroneous to issue an execution before the motion for a new trial had been disposed of, but as the case resulted in favor of the plaintiff, this error caused no injury to the defendant." And the judgment refusing to quash the execution was affirmed.

In *Mollison v. Eaton*, 15 Minn., 426, it was held a harmless irregularity to issue execution before the judgment was docketed, although a statute positively required a judgment to be docketed in another county before execution could issue. It was not such an irregularity as made the judgment void, and the levy was allowed to prevail over a warrant of seizure from the Bankrupt Court.

It may well be doubted whether the plaintiff did not have the right to issue this execution at the time he did. It was ruled in the order of continuance itself that it was not to operate to his prejudice. I have been unable to find the question decided in Tennessee. I do find elsewhere that the rule is that, unless the order of continuance directs a stay of execution, the plaintiff may issue the execution immediately at the risk of having it rendered a nullity by the decision of the motion for a new trial in favor of the defendant. *Erie*

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R. R. Co. v. Ackerman, 33 N. J. Law, 33. But I do not decide this here, as it is unnecessary to the determination of the rights of the parties. The levy was not void because the execution issued prematurely, and now that the motion for a new trial has been overruled, the plaintiff should not, because of a mere irregularity, be deprived of the fruits of his diligence. Nor do I think the levy was abandoned by the marshal. He only stopped at the point to which the proceedings had progressed, when it was arrested by the letter to the clerk. The service of a watchman was not necessary to his title, and his withdrawal was unimportant. The Supreme Court of Tennessee, in the case of *Breedlove v. Stump*, 3 Yerg. 257-276, has declared the rule for all cases where abandonment of a right is relied on thus: "To constitute an abandonment of a right secured, there must be a clear, unequivocal and decisive act of the party; an act done which shows a determination in the individual not to have a benefit which is designed for him."

The question is argued by counsel on both sides whether this is real or personal property, on the assumption that unless it is real property, a *venditioni exponas* cannot issue. The writ is used to compel a sale of personalty levied on, as well as a sale of realty. It is true that the sheriff may, in case of a levy on personalty, go on and sell after the return of the *feri facias* without a *venditioni exponas*, while in case of a levy on realty he cannot; but in either case it is proper to issue a *venditioni exponas* whenever it becomes necessary to enforce a sale. *Campbell v. Low*, 2 Sneed, 18; *Overton v. Perkins*, M. & Y., 375; S. C., 10 Yerg. 328; *Thompson v. Phillips*, 1 Bald. 246-267; Tidd's Pr. 1020; Freem. Ex. Secs. 57-58.

It is therefore unnecessary that I should decide the question argued as to whether the leasehold is real or personal property. Motion granted.

NOTE.—There were two judgments involving the same facts.

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In the following case are discussed two or more questions that were passed upon in *Dawson v. Daniel* by Judge HAMMOND, and perhaps more fully:

STEERS ET AL. v. R. C. DANIEL AND OTHERS.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—JULY 25, 1880.

1. **LEVY OF EXECUTION ON LEASEHOLD AND FIXTURES—WHAT IS A GOOD LEVY IN SUCH CASE.**—In making a levy on a leasehold, even where it is taken as a chattel interest, the sheriff or marshal cannot oust the tenant in possession, or the execution debtor, without his consent, and he cannot in the nature of the thing, be required to exercise any dominion or control over it, founded on any idea of right to the possession. He should proclaim his levy to those in charge and notify the tenants of it, but even that is not necessary to sustain a levy in such case. Leaseholds are incapable of being levied on in any other manner, and it is everywhere held that where the property is incapable of manual delivery, or is ponderous and immovable, the taking into possession by the sheriff or marshal is impracticable. Such facts must be held to modify that dominion and control which the officer must ordinarily keep up.

2. **WATCHMAN—POSSESSION—ABANDONMENT.**—No watchman is necessary for the purpose of keeping title in the marshal, either of the leasehold or machinery; nor need the fixtures be separated from the leasehold property, and a failure to have the one, or do the other thing, is no abandonment of the levy.

3. **THE QUESTION, WHETHER LEASEHOLDS ARE CHATTELS OR REAL ESTATE.**—Leaseholds in Tennessee are to be levied on and sold as real estate, and judgments operate as liens on them. Purchasers are compelled to bring ejectment for the recovery of possession.

4. **LEVY BY MARSHAL ON LEASEHOLD AND MACHINERY—SUBSEQUENT LEVY BY SHERIFF OF AN ATTACHMENT—WHO HAS THE TITLE.**—After the marshal levies on leasehold and machinery, though he withdraws a watchman, put there by him to protect the property from fire, his title in the property is not affected by the levy of an attachment in the hands of the sheriff, made subsequent to the withdrawal of such watchman.

5. **ESTOPPEL.**—The execution creditor, if the debtor in the meantime conveys to a mortgagee, has a superior title to such mortgage; and if the latter, by his own conduct, secures a letter from the judge and order from the clerk suspending proceedings, he is estopped from setting up an abandonment of the levy; nor can such subsequent mortgagee, knowing the facts, do so.

6. **RES ADJUDICATA—PRACTICE—MOTION.**—An application was made for a *vend. ex.*, which was resisted by affidavits, in which it was attempted

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to be shown that there was an abandonment of a levy. This was noticed on the merits, and does not prevent the institution of other proceedings by bill.

The principal facts of this case, down to the action of Steers & Co., are fully reported in this volume, pp. 301-310, which the reader should consult.

On the 7th day of August, 1878, Steers & Co. filed their bill in the Chancery Court of Shelby county, in which they sought to attach the leasehold property of Daniel, claiming as they did, a mechanic's lien. The attachment was, by the sheriff, duly levied on the property. The attorney for Steers & Co., before the levy, went to the marshal and asked him whether he intended to sell the property levied on by execution. The marshal replied that he had not determined that question, but added: "I have removed my watchman; you can take the property and do what you please with it." The attorney at once caused the attachment to be levied. The marshal testified that he did not tell the attorney he could do as he pleased with the property, but only this—that he had withdrawn his watchman. He further stated that he did not intend to abandon his levy, but simply to return his writ because of the "order" of Judge BAXTER, and await further instructions. He swore that he had advised with the attorney of the execution creditor when such "order" was received, and was told that that was "unauthorized," and he was warned not to abandon his levy. Besides, this attorney informed him that the leasehold was real estate, and no watchman was necessary and, as he was not willing to say that the expense of keeping such watchman would be paid by his client, advised him to withdraw him.

Daniel, by decree of the State Court, was let into possession as *quasi* receiver, and authorized to go to work. On November 22, 1878, he executed a deed to H. C. Warrinner, Steers' lawyer, to secure that firm, and at same time another deed to one Jno. J. Freeman to secure his sisters and others, conveying (both deeds) the leasehold, press and fixtures. In this court, at its November term, 1878, the motion theretofore entered in the case of *Dawson v. Daniel* for a new trial was overruled, and plaintiff, Dawson, moved for a *vend. ex.* to compel the marshal to proceed with his levies. As will be seen by reference to report of that case, *supra*, the motion was resisted, and it was insisted that the levy was abandoned and that such writ should not issue, first, because the *ft. fa.* had issued prematurely and was void, and not on the ground that the levies had been abandoned. On February 8, 1879, the court granted the motion.

Steers & Co., on February 12, 1879, removed their bill into this court, and moved to enjoin Dawson from proceeding to sell under the *vend. ex.* and for a receiver. Freeman, thereupon, filed a cross-bill, in which he resisted the claim to the property on the part of Dawson, on the ground of abandonment of the levy and that the execution was void. The sisters

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of Daniel also filed a cross-bill, in which they insisted that Daniel had used their trust money in the purchase of the property, and endeavored to set up a resulting trust in their favor, while Steers & Co. filed a supplemental bill in which they put forth their claims under the Warrinner deed.

And now, all the parties having agreed that the marshal should be, he was accordingly appointed a receiver provisionally. A private sale of the property was effected at the price of \$30,000, which the court approved. According to the terms of the decree, \$6,000 of this money was deposited in court to await the decision of the contest between Freeman and Dawson; the balance being paid in discharge of Steers' claim and, in part, that of the sisters. The only question now was, who has the better title to this \$6,000—Dawson, the judgment creditor, or Freeman, trustee for the sisters of Daniel?

Gantt & Patterson and Metcalf & Walker (with whom was *William S. Flippin*) for complainants.

Humes & Poston and Lowry Humes, for defendant Dawson.

HAMMOND, J.—This case is to be decided upon the issues made by Freeman's cross-bill, and stands as if he had enjoined further proceedings upon the *venditioni exponas*. If a sale had taken place under that writ, Dawson, the execution plaintiff, would be entitled to the money, no matter what kind of a title had been conveyed. *Hutchman's Appeal*, 27 Pa. St. 209. On the other hand, Freeman can claim nothing under the Steers writ of attachment, and it is immaterial how the case would stand as between Steers and Dawson, or what would have been the result of a controversy between the marshal and the sheriff on the facts of this case. Happily, that controversy is out of the way.

The facts as to the sheriff's levy are only important as throwing light on the question of abandonment by the marshal. Freeman claims that the levies were abandoned at the time the deed of trust was made to him, if not as to the leasehold, certainly as to the machinery, which he claims was personal property, whether the leasehold was or not, and that as to neither did the marshal keep up that dominion and control which the law requires to perfect Dawson's title. It does not lie in the mouth of Daniel, or any one claiming under him with notice, to predicate upon the conduct of the marshal any claim of abandonment. If it was an illegal and unauthorized act of the judge, the clerk, or the marshal, to suspend proceedings, it was a fraud on Dawson for Daniel to procure the suspension, and he can take no advantage of it. If the acts of the judge, the clerk, and the marshal were valid, the "order" did no more than suspend proceedings where it found them. An injunction may have operated to release the levy, but not such a proceeding as that. *Bisbee v. Hall*, 3 Ohio,

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449. Freeman's conveyance was made while the proceedings were pending. The marshal's return disclosed the levy, and precisely how and in what manner it was suspended; and, moreover, Daniel was in possession as a receiver under this Steers bill, to which Dawson was a party. Freeman could not, therefore, be a purchaser without notice, even if he can be treated as a purchaser for value at all, where the trust is to secure antecedent debts. However the conduct of the marshal might be construed in the case of a subsequent execution creditor, Daniel cannot claim it to be an abandonment, and Freeman occupies no better attitude in filing the bill.

I adhere, however, to the opinion expressed in the case of *Dawson v. Daniel*,* that, in a strictly legal contest over this title, the facts show no such abandonment as will defeat the title of Dawson, and that without reference to any equitable consideration above mentioned. The question of abandonment is to be tested, not so much by what the marshal did, as by what he was required to do. If, for example, the placing a watchman in charge was unnecessary, his withdrawal cannot be an abandonment. The marshal was evidently trying to hold on to his levies, and all he did must be interpreted in the light of that intention. Yet, if the legal effect of his conduct was an abandonment, his intention to hold on cannot save the levies.

Let us first consider the question without reference to the disputed point whether a leasehold is real estate, and without regard to the "fixtures." Precisely how a sheriff "seizes" or "takes in execution" a term for years, it is difficult to say from anything that has come under my observation. In Pennsylvania, although a leasehold was personal property, and was sold as such, no deed or condemnation being required, as in the sale of lands, it was levied on and sold in the same manner as real estate, the sale and return of the sheriff operating to pass title. *Williams v. Douling*, 18 Pa. St. 60; *Sowers v. Vie*, 14 Pa. St. 99; *Dalzell v. Lynch*, 4 W. & S. 253.

I take it the same method is proper in Tennessee. *Thomas v. Blake-more*, 5 Yerg. 113. I understand that to have been only a paper levy, and it was held that neither a deed nor registration was necessary. It is said in Freeman on Executions that, as to personal property, there must be something more than a mere pen-and-ink levy. Section 260. But this cannot apply to leaseholds, for they are incapable of anything else, and it is everywhere held that where the property is incapable of manual delivery, or is ponderous and immovable, these facts must be held to modify that dominion and control which the officer must keep up. *Id.* §§ 262a, 263, 280.

In England an assignment of the term was necessary to complete the

* Reported in this volume, page 305.

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sale, because of the statute of frauds, and without it the sale was void. Everywhere it was held that the purchaser must bring his ejectment to obtain possession. It was so under the statute of *elegit*, which commanded the sheriff to deliver all the goods and chattels and one-half the lands to the plaintiff. And it was so under the *levari facias*. Under the *elegit*, the plaintiff could treat the leasehold either as chattels, and take the whole at a price, or as lands, and take one-half by extent. The sheriff could enter, if he found the gates and door open, to hold his inquisition, but for no other purpose. If he delivered the term as chattels, or extended one-half as lands, all the tenant, by *elegit*, could do was to bring ejectment. So, under the *feri facias*, all the sheriff did was to sell and assign the term, and the purchaser was put to his ejectment to obtain possession. There was one exception only to this, and that was, if the execution debtor consented to surrender possession the sheriff might put his purchaser and assignee in possession under the *fi. fa.*; but he could not do this by force. If he happened to find the tenant absent he could not seize the possession against his will, for that would be taking forcible possession, which was not allowed. Perhaps the purchaser, if he could get possession, might, relying on his title, retain it under such circumstances, but this principle would not authorize the sheriff to eject the debtor. *Watson, Sheriff*, 178, 188, 206, 212, (5 Law Library, 128, *seq.*;) *Sewell, Sheriff*, 226, (36 Law Library, 175;) 2 Saund. 68, 70; 3 Bac. Ab. tit. "Execution," c. 4, p. 699, (Bouvier's Ed. A. D. 1860;) *Id.* c. 2, p. 688; 5 *Id.* tit. "Leases," p. 433; *Taylor's Landlord and Tenant*, § 435; *The King v. Dean*, 2 Show. 88; *Taylor v. Cole*, 3 T. R. 292; *James v. Brown*, 5 B. & Ald. 243, (7 E. C. L. 83;) *Hughes v. Jones*, 9 Mees & Wels. 372; *Playfair v. Musgrove*, 14 Mees & Wels. 239; *Rogers v. Pitcher*, 6 Tatunt. 207; and, see *Porter v. Cocke*, Peck R. 34, (Tenn.)

I am of opinion, therefore, that, in making a levy on a leasehold, even where it is taken as a *chattel interest in real estate*, the sheriff cannot oust the tenant in possession or the execution debtor without his consent, and that he cannot, in the nature of the thing, be required to exercise any dominion or control over it, founded on any idea of a right to the possession. He should, no doubt, proclaim his levy to those in charge, and notify the tenants of it; but, strictly speaking, I do not find that even that is necessary to maintain his levy. That which the marshal did in this case was abundantly sufficient. He had no right to put a watchman on the premises, nor to remain on them himself without the consent of Daniel; and, his presence not being necessary to symbolize his title under the levy, his withdrawal was no abandonment; neither was he required to watch and warn off trespassers, whether they came as officers with writs or otherwise.

In *Very v. Watkins*, 23 How. 469, 474, it was said, even of a box of jewelry, that if the officer had a view of it, and it was in his power, he

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need not take actual possession, but may declare his levy without actual seizure. If any one disputes his title he may retake the property wherever he finds it. *Parriah v. Danford*, 1 Bond, 345. On the theory, then, that the marshal was required to levy on the leasehold as goods or chattels, his levy was complete and his title good, and he could at any time have made an actual seizure, if it became necessary. It was in his constructive possession, and that was enough. The sheriff, on that theory, was a trespasser. Owing to comity between the courts the marshal would, perhaps, not be able to turn him out without an application to the State Court itself, but the sheriff's wrongful possession did not displace the marshal's levy. His levy was notorious and sufficient, and the nature of the property was such that he could not and need not take any kind of actual possession. Neither the withdrawal of the watchman nor the entry of the sheriff can, therefore, be treated as an abandonment by the marshal of his title. The fallacy of the plaintiff's position is in supposing that to make or hold a valid levy the marshal should place a watchman in charge, or do some such significant act to manifest and keep up a manifestation of his title; or that, having assumed to do this in the beginning of his levy, a subsequent neglect to do it is an abandonment. So far as his acts were excessive, he might release such excess without incurring any imputation of abandonment. He could not legally have forbidden the entry of the sheriff, because, as we have shown, he had no right to the possession of the leasehold lot, and an action of ejectment was necessary to recover that possession. The coerced return of the writ was no abandonment, and all along the marshal had all the dominion and control that he lawfully could have acquired by his levy in the first instance.

Does the case stand differently as to the machinery? If it be conceded that the machinery is to be treated as personal property, regardless of its annexation to the land, yet, owing to the fact that it was fixed to the soil, was ponderous, and incapable of manual delivery without a severance from the soil, the marshal did all he could do to make an effectual levy, and to keep it up, as I have already shown by the authorities last cited. See, also, *Gladstone v. Padwick*, L. R. 6 Exch. 203. It is undoubtedly true that the officer may remain on the premises where the goods he takes are situated long enough to remove them, but I think he was not required to tear down this machinery and remove it. Except for that purpose he had no right on the lot at all after he had declared his levy. He might well let it stand as he found it; until the sale, at least.

But I cannot assent to the theory that, with such machinery as this, an officer with an execution can sever it and sell it separate and apart from the leasehold. It might not pass under a levy on the leasehold alone, and as a part of it; but that is not the question. He levied on it by name as machinery, and likewise on the leasehold, and the real question is

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whether he should have severed and sold; or, rather, that being his duty, whether his failure to do it was an abandonment. I am satisfied his duty was to levy, as he did, on both, and sell both together, in precisely the condition the lessee had placed it; otherwise, this valuable machinery, costing many thousands of dollars, would be unnecessarily impaired in value by severance, and so would the leasehold. The value of each is enhanced by keeping them together.

It is sometimes loosely said in the books that whatever the tenant can remove must be levied on and sold as personal property. This may be so as to mere utensils of trade, or trade "fixtures," which are portable, and not seriously injured or rendered useless by severance. But not so as to structures like this. No doubt the press is valuable when severed, and can be placed on other land, but the mere cost of taking down and putting up is so great, that its value standing and ready for work is far greater, and it cannot be that a debtor can be compelled to submit to a mode of levy and sale which so deteriorates his property. If so, it could be severed and sold on an execution for any small amount. Take the case of buildings built on leasehold land with a covenant for removal. Can it be said that they must be severed and sold by the sheriff, rather than sold all together? It does not follow because the leasehold, or the structures upon it, are personal property, and are sold as such, that they are to be treated as loose or portable chattels, or that the structures are to be severed to make them so. Both being chattels, they may, in a proper case, be sold as a whole; and, if the leasehold be real estate, in the hands of the lessee, the fixtures on it must be real estate, as between him and his creditors, just as they would be if his estate was freehold. Perhaps the true theory is that the fixtures, when of a character to be real estate, if the owner has a freehold in the land, are also real estate if he has only a leasehold with a right of removal, and that it is the right of entry, severance, and removal which is levied on and sold. But the purchaser, if the leasehold can also be sold, buying that, has the same right to let them remain as they were, until it suits his pleasure or interest to remove them, as the lessee or execution debtor had. And, in this view, it is immaterial whether they be real estate or chattels; and I think the sheriff, in a case like this, whether he sells as real property or chattels, should sell all together.

It is not necessary to extend this opinion by reviewing the cases here cited which have led me to this conclusion. Cases on the subject of fixtures are so numerous, differential, and conflicting that it is quite impossible to find authoritative precedents for any case. It has been frequently said that each must be governed by its own circumstances. The ruling I make here is only that, in a case like this, the machinery must be treated as a part of the leasehold, whether it be real estate or personal property; and that no other duty was required of the marshal in making

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and keeping up his levy on the machinery than was required in making and keeping up his levy on the leasehold; and, therefore, the levy on the leasehold not having been abandoned, the levy on the machinery was not abandoned by the acts relied on to show such abandonment. *Ewell*, Fix. 353, 357; *Tyler*, Fix. 159, 164, 192, 240, 416, 626; *Freeman*, Ex. § 114; *Watson* Shff. 170; *Van Ness v. Packard*, 2 Pet. 137; *Kutter v. Smith*, 2 Wall. 491; *Gus v. Tidewater Co.*, 24 How. 257; *Ethos v. Maw*, 2 Smith, Leading Cases, (7th Ed.) 177, 212, 220, 222; *Pemberton v. King*, 2 Dev. Law, 376; *Conkling v. Foster*, 57 Ill. 104; *Pillow v. Love*, 5 Hayw. 109; *De Graffenreid v. Scruggs*, 4 Humph. 451; *Childress v. Wright*, 2 Cold. 350; *McDavid v. Wood*, 5 Heisk. 95; *Cannon v. Hara*, 1 Tenn. Ch. 22, 25; *Boydell v. McMichael*, 1 Crompt. Mees. & Ros. 177, note a, p. 180; *Hallen v. Runder*, Id. 266, 275; *Stewart v. Lombe*, 1 Brod. & Bing. 506; S. C. 5 E. C. L. 768; *Barnard v. Leigh*, 1 Stark. 27; S. C. 2 E. C. L. 217; *Doty v. Gorham*, 5 Pick. 487; *Potter v. Cromwell*, 40 N. Y. 287; *Murdock v. Gifford*, 18 N. Y. 28.

Moreover, I am of opinion that, in Tennessee, leasehold interests are now real estate so far as concerns judgments and executions, and that this judgment was a lien upon this property. The cases already decided in Tennessee settle this principle, though none of them are cases of execution levies. Section 51 of the Code says that the words "real estate," "real property," and "land" include lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal. T. and S. Code, § 51. We have seen that under the statute of *elegit* leaseholds were held to be included in the words "*medietatem terræ suæ*." *Porter v. Cocks*, Peck, R. 34; 1 Sug. Vend. 660; 2 Tidd, Pr. 1035, 1004; 5 Bac. Ab. title, "Cases," 433; *Watson*, Sheriff, 207. In *Evans v. Roberts*, 5 Barn & Cress, 828, (S. C. 11, E. C. L. 701,) it is said that in the English statute of frauds the words "lands, tenements, and hereditaments" were used to denote a fee-simple, and the words "any interest in or concerning them," to denote a chattel interest, or any interest less than fee-simple. These are almost the words of section 51 of the Tennessee Code.

It will be found, in examining the subject, that ever since lands in the colonies were subjected to execution there has been, particularly in the colonial and earlier State legislation, a disposition to assimilate leaseholds, at least for long terms, to real estate. The courts sometimes construed the words "real estate" and "lands" to include them, but generally it was held those words did not. Many of the States have, by statute, made them real estate, and there is nothing novel in so treating them. This section of the Code, in my opinion, was intended especially to make leaseholds subject to the incidents of real estate where the statute does not otherwise particularly direct. The case of *The People v. Westervelt*, 17 Wend. 674; S. C. 20 Wend. 416; and *Putnam v. Westcott*, 19 J. R. 73; and the cases cited in *Freeman on Executions*, § 119, and other text

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writers, show the growth of legislation and judicial decision in this direction of making leaseholds real estate.

In *Burr v. Graves*, 11 Central Law Journal, 471, the Supreme Court of Tennessee held that a leasehold, with its machinery and fixtures for cleaning cotton, could be seized under attachment without going on the premises or taking possession of the property. It is true, the attachment was to enforce a statutory mechanic's lien, but the procedure would be the same, as I have endeavored to show, at common law, and without any lien. Indeed, our method of selling real estate under execution finds its archetype in the common law mode of selling a leasehold under the *feri facias, elegit*, and *levari facias*. The case cites with approval *Kelly v. Schultze*, 12 Heisk. 218; *Choate v. Tighe*, 10 Heisk. 621; and *Pemberton v. King*, *supra*. Mr. Justice COOPER was one of the authors of the Code, and in delivering this opinion clearly points to the inevitable results that, as to judgments and executions, leaseholds are now real estate. But see *Buhl v. Kenyon*, 11 Mich. 249, where a contrary doctrine is asserted, under a similar statute, by a court entitled to the utmost respect.

In the view I have taken of this case it is unnecessary to examine the question so much argued, whether the adjudication of these questions in *Dawson v. Daniel*, *supra*, on the application for a *vend. ex.*, is *res adjudicata* of the questions now made by this bill. I think it was not such an adjudication as precludes either Daniel or those claiming under him from resisting the title of the execution creditor in any appropriate way. The only question there was whether a *vend. ex.* should issue, and that proceedings could not be converted into a trial upon affidavits of the right of property. It was a bare motion, from which not even a writ of error could be sued. *Boyle v. Zacharie*, 6 Pet. 656.

Let decree be entered declaring that Dawson is entitled to the money, and, after paying the costs of the suits at law, including the marshal's commissions for sale, the balance may be paid to him. The costs of the original and supplemental bills having been already paid out of the fund, the costs incident to the cross-bills, and all costs since the agreed decree, will be paid by Freeman out of the fund in his hands as trustee. But all the parties may have a decree for their costs against Daniel.

Decree accordingly.

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UNITED STATES v. WILLIAM STATON.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
DECEMBER 23, 1878.CRIMINAL LAW—DISTILLING—ATTEMPT TO DEFRAUD, AND IN-
TENT TO DEFRAUD.

1. An indictment under Section 3257 of Revised Statutes of the United States does not in itself so describe the offense charged, as to give a defendant notice of the nature and cause of the accusation, while, under Section 3281, to charge the violation of the law in the language of the statute is sufficient, because it describes the offense as an intent to defraud the United States of the tax on spirits distilled, by the act of engaging in and carrying on the business of a distiller.

2. STATUTE DEFINING OFFENSE.—If the statute itself so defines the act or acts constituting an offense as to give to the offender information of the nature and cause of the accusation, the indictment need go no further than the statute; but if it does not, of itself, do this, averments looking to the security of the constitutional right to such information, must be added. The Constitution, in all criminal prosecutions, secures to the defendant the right of being informed of the nature and cause of the accusation.

Jno. B. Clough, U. S. Assistant District Attorney, for the United States.

W. M. McCall, Attorney for defendant.

HAMMOND, J.—This is a motion for a new trial and in arrest of judgment. The defendant stands convicted upon two counts of an indictment which are as follows:

1. "The grand jurors represent, that William Staton, etc., on, to-wit, the first day of March, 1877, * * * in the district aforesaid, was a distiller, and was then and there engaged in carrying on the business of a distiller, by then and

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there producing distilled spirits, and by then and there brewing, and by then and there making mash, wort and wash fit for a distillation and for the production of spirits, and by then and there making and keeping mash, wort and wash, having also then and there in his possession and use a still; and, that being so then and there engaged in carrying on the business of a distiller as aforesaid, he, the said William Staton, did then and there unlawfully, with force and arms, defraud and attempt to defraud the United States of the tax on the spirits so then and there distilled by him, the said William Staton, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

2. "The grand jurors aforesaid, etc., do further present, that said William Staton, etc., on, to-wit, the day and year aforesaid, in the district aforesaid, etc., unlawfully, with force and arms, was carrying on the business of a distiller by then and there producing distilled spirits, and by then and there brewing, and by then and there making mash, wort and wash fit for distillation and for the production of spirits, and by then and there making and keeping mash, wort and wash, and having also then and there in his possession and use a still, then and there with intent of him, the said William Staton, to defraud the United States of the tax on spirits, so then and there distilled by him, the said William Staton, as such distiller, as aforesaid, contrary to the form," etc.

The proof shows that the defendant gave bond and otherwise complied with the law regulating distillation of brandy made exclusively from apples, peaches, or grapes, known as a fruit distillery, then being in possession of about two hundred and seventy gallons of spirits distilled by him; the casks containing it were gauged by the proper officer, and the spirits were subsequently sold by the defendant without paying the tax upon them required by law.

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A new trial is asked on the ground that the defendant objects to and moved to exclude all testimony showing more than one sale, and because the government was not confined in its proof to the first unlawful transaction it undertook to prove. This objection proceeds on the idea that each separate sale was a separate offense and that the government must elect on which one it will try the defendant. The defendant was not indicted for unlawfully selling the spirits without paying a special tax therefor, but under one count for defrauding the government of the tax on spirits distilled by him, and under the other count for engaging in the business of a distiller with the unlawful intent to defraud the government of the tax on such spirits. Any acts, no matter how numerous, which would show, either that he defrauded the government of the tax, or carried on the business with that intent, were admissible. These were the circumstances which evinced the design with which the act was done and demonstrated the intent, and were the acts by which the fraud on the revenue was committed. The motion for a new trial should therefore be overruled.

The motion in arrest of judgment is based on the alleged insufficiency of the indictment, in not describing the offense charged so as to give the defendant notice of the violations of the law he is required to meet and defend.

The first count is drawn under section 3257, and the second under section 3281 of the Revised Statutes of the United States. Section 3257 enacts that, "Whenever any person engaged in carrying on the business of a distiller, defrauds, or attempts to defraud, the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery, etc., and shall be fined not less than five hundred dollars, nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years."

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This section does not in itself so describe the offense as to give the defendant notice of the nature and cause of the accusation. It was held in the case of *The United States v. Simmons*, 96 U. S. Rep. 360, that it is sufficient, under section 3281 of the Revised Statutes, to charge the violation of the law in the very language of the statute, because it describes the offense as an intent to defraud the United States of the tax on spirits distilled, *by the act of engaging in and carrying on the business of a distiller*. This accusation in itself apprises the accused of the act for which he is arraigned, namely, carrying on the business of a distiller with the unlawful intent. The facts and circumstances by which the intent is demonstrated need not be alleged in the indictment and are only matters of proof. But suppose that, disconnected with this act of carrying on the business of a distiller, it were simply charged that the defendant had defrauded, or attempted to defraud, the United States of the tax on certain spirits; is it not plain that the defendant would have no notice of the act for which he is called to account? Now, this is the distinction between the two sections 3257, and 3281: the first makes all acts of a distiller, whereby he defrauds, or attempts to defraud, the United States of the tax on spirits distilled by him, offenses, but does not attempt to designate any of them, while the second describes and defines one particular act as an offense, namely, engaging in the business of a distiller with a particularly described intent.

And I think, after a careful consideration of the cases on the subject, that this will be found to be the true test between those where it is sufficient to allege the offense in the language of the statute, and those where it is not. If the statute itself so defines the act or acts constituting the offense as to give to the offender information of the nature and *cause* of the accusation, the indictment need go no

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further than the statute; but if it does not of itself do this, the averments necessary to secure the constitutional right to such information must be added. It makes no difference whether the crime be a felony or a misdemeanor, the Constitution secures to the defendant, "in all criminal prosecutions," the right "to be informed of the nature and cause of the accusation." U. S. Const. Amendment, VI. *United States v. Cruikshanks*, 92 U. S. 542, 557, 558; *United States v. Simmons*, 96 U. S. 360; *State v. Kilgore*, 6 Hump. 44; *State v. McElroy*, 8 Heisk. 69.

In all the cases cited by the learned counsel for the government it will be found either that the statute gave sufficient information, or that the averments themselves did so. In *United States v. Henry*, 3 Ben. 29, the fraudulent bond was pointed out. In *United States v. Ballard*, 13 Int. Rev. Rec. 195, the particular entry of "one brown horse" was designated. In the *United States v. Fox*, 1 Lowell, 199, as under section 3281, in *United States v. Simmons*, 96 U. S. 360, the statute described the act denounced as that of carrying on the business of a distiller without having paid the special tax therefor, and it was held that by analogy to common law indictments for being a common barrator, scold, etc., it was sufficient to allege a general carrying on of a certain trade, where that was the crime charged. But even in that case, the allegation was, that the business was carried on between two designated dates, which was held sufficiently to describe the act to give the defendant notice. In the *United States v. Gooding*, 12 Wh. 460, the particular ship and time and place were given, so that the defendant knew what he was called to answer.

In the case now under consideration, by the first count of the indictment, the defendant is left without any circumstance of time, place, or occasion, to indicate to him the act he is called to defend. The particular spirits or packages are .

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not described, the place where found, or where distilled by him; and no clue is given to the particular act of his which is alleged to have been either a fraud or an attempt at a fraud upon the revenue. He cannot read this count of the indictment and say from it what act of his is called in question. It is clearly too indefinite and vague to apprise him of the cause of the accusation. The judgment upon this count will be arrested.

The second count, for reasons already stated, is sufficient, and the case of the *United States v. Simmons, supra*, directly sustains it.

The motion in arrest as to that count is, therefore, denied.

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DISTRICT COURT—WESTERN DISTRICT OF TENNESSEE—JANU-
ARY 11, 1879.

EXEMPTIONS.

1. Where the register allowed the bankrupt, who was engaged in commerce, a watch of small value: *Held*, proper, as the same was a necessary article.

2. The court construes the words in the bankruptcy act, "other articles," "necessaries," and "wearing apparel," also what is meant in the books by "necessaries."

HAMMOND, J.—By agreement between the assignee and the bankrupts, the question is submitted for the opinion of the court, as if on certificate of the register, whether or not the refusal of the assignee to allow them each his gold watch as exempt property, is proper under the circumstances set out

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in the agreement of facts. John Steele has been allowed, and claims no exemption except this watch, which is described as "a plain, old style, single case gold watch, which he has owned for twenty-five years or more, and which would scarcely sell for twenty-five dollars." R. L. Steele has been allowed household furniture worth not more than one hundred dollars. The kind and value of his watch is not stated.

The decisions on this subject are conflicting. I have examined a good many cases on the general subject, and find that the conflict grows out of the diverse views as to whether the particular articles claimed are necessities or luxuries, useful or only ornamental. It is said in *Montague v. Richardson*, 24 Conn. 338, that each case must depend upon its own peculiar circumstances. I think this is a correct view, and that in some cases the assignee may and should allow a watch or other time-piece, and in others he should not. These parties were a firm of merchants, and their valuable assets had been surrendered to their creditors. They proposed to engage again in commercial pursuits. It was held in *Harrison v. Mitchell*, 13 La. Ann. 260, that a desk and iron safe were exempt as necessary implements, to carry on the business of a commercial man.

It would not be doing any great violence to the meaning of the term "wearing apparel," as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word "apparel," as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man "wears" a watch or "wears" a cane. The exemption law of Arkansas says that "wearing apparel shall be exempt, except watches." Ark. Dig. 503, 504; James' Bankruptcy, 58; Avery & Hobbs' Bankr. 68. In *Peverly v. Sayles*, 10 N. H. 356, under a statute which exempted "wearing apparel necessary for immediate use," it

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was held that an overcoat and a suit of clothes "to go to meeting in" were included. In *Ordway v. Wilbur*, 16 Me. 263, cloth sent to a tailor to be made into clothes was in that form held to be exempt as "apparel."

In *Bumpus v. Maynard*, 38 Barb. 626, the debtor was in bed—his clothes were on a chair, and his watch on a table. The officer was sued for refusing to levy on them, and it was held that they were exempt as "wearing apparel," notwithstanding they were not on the person. There are some expressions in the case which indicate that possibly the court did not intend to include the watch as "wearing apparel," but it is probable they did. It was decided in *Smith v. Rogers*, 16 Ga. 479, that a watch was not wearing apparel. But in *Mack v. Parks*, 8 Gray, 517, it was held, in a case where an officer with an attachment asked the debtor to let him look at his watch, and being permitted tore it from his person by breaking the cord to which it was attached, that the watch was exempt from seizure at common law, because by that law wearing apparel on the person was exempt from levy or distraint. See Freeman on Ex., sec. 232.

We have no State statute in Tennessee, that I can find, exempting wearing apparel, and we depend on this common law principle for immunity in such cases. It is said in *Richardson v. Duncan*, 2 Heisk. 220, that our exemption laws are to be liberally construed, and this is the universal doctrine of modern times. In that case it was held that an "ass" is included in the statute which exempts "a horse, mule or yoke of oxen;" and in *Webb v. Brandon*, 4 Heisk. 285, an ox-wagon is included in the description—"one two-horse wagon." But whether a watch may be included in the statutory exemption of "wearing apparel" or not, it certainly may be allowed as "other necessities" under certain circumstances.

The act (Rev. Stat. 5045) says: "There shall be excepted from the operation of the conveyance the necessary house-

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hold and kitchen furniture, and such other articles and necessities of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars." Under this clause the late Judge McDonald, of the District of Indiana, held *In re Thiell*, 4 Biss. 241, that a cheap watch might be included, but the same learned judge held *In re Cobb*, 1 N. B. R. 414, that mere articles of luxury and ornament, such as watches, pianos, and the like, should not be allowed. *In re Graham*, 2 Biss. 449, HOPKINS, J., refused to allow watches. Some other cases, cited in the district courts, where the identical question has been considered, have not been accessible for examination; but I presume, as in these cases, they all turn on the question whether or not the particular watch, under the circumstances, was an article of necessity only, or an article of luxurious ornament, in which too much money had been invested to allow it in justice to the creditors. It will be found in all the cases where the law does not exempt *the article itself*, when value is immaterial, that this question of the reasonable or unreasonable value of it controls the case. The question is to be determined not solely by an appraisal of the particular article, but also by the attendant circumstances, or, as this statute puts it, "having reference in the amount to the family, condition, and circumstances of the bankrupt." The assignee is to determine the question, not by mere arbitrary choice on his part, but by the exercise of a sound legal discretion, subject to the final decision of the court, in the exercise of its supervising power. *In re Feely*, 3 N. B. R. 66; *In re Thiell*, 4 Biss. 241.

The phrase "other articles and necessities" is a comprehensive but indefinite expression, and I have been at pains to discover the principle that is to direct the assignee and the

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court in the exercise of the discretion. This act is framed like other exemption acts, and doubtless, with full knowledge of the adjudications of the State courts under similar statutes. In *Leavitt v. Metcalf*, 2 Vt. 342, the statute exempted "such suitable apparel, bedding, etc., and articles of household furniture as may be necessary for upholding life." It was held that "one brass time-piece" was included, and the court say there were two former decisions exempting the "debtors' only time-pieces," but they are not cited. "It must be admitted," say the court, "that there is a great convenience in a family having some means of keeping time, even in health, but more especially in sickness. We do not pretend that a time-piece is absolutely necessary for subsistence, and also many other articles that have always been considered exempt under this statute. The word 'necessary,' or 'necessaries' has ever been considered, in legal language, to extend to things of *convenience and comfort*, and to things suitable to the situation of the person in society, and is not confined to things absolutely necessary for mere subsistence." An instructive case is that of *Hitchcock v. Holmes*, 43 Conn. 528, where it is said we may "pass beyond what is strictly indispensable, and include articles which, to the common understanding, suggest ideas of comfort and convenience. But having done this, the obligation is upon us to exclude all superfluities and articles of luxury and ornament." Certain expensive furniture, including a costly clock, were, therefore, excluded; but a dissenting judge thought the clock should have been allowed. A piano was thought to be a luxury, because "it is not an article of mere comfort, and does not minister to a want universally felt." *Dunlap v. Edgerton*, 30 Vt. 224. In *Garrett v. Patchin*, 29 Vt. 248, it was said the term "necessaries" means that which is convenient or useful—which a man procures for his own personal use, unless extravagant." And see *Montague*

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v. *Richardson*, 24 Conn. 338, which cites *McCullough v. Maryland*, 4 Wheat. 316; *Davlin v. Stone*, 4 Cush. 359, which says, "the articles may be of that plain and cheap character which, while not indispensable, are to be regarded amongst the necessities of life, as contradistinguished from luxuries." See, also, *Wilson v. Ellis*, 1 Denio, 462, and *In re Thornton*, 2 N. B. R. 189. Guided by these humane and liberal principles of construction, I should say that to a commercial man a plain, and not extravagantly costly watch, such as this bankrupt owns, is, in the quaint language of the Vermont statute, "necessary for upholding life." The watch of John Steele should be allowed. As to the other I cannot determine, its value not being stated. If the parties cannot agree, they may have leave to make further application in the matter.

This case is inserted because of the discussion of exemptions in general. The learning on the subject is fully gone into, and may afford aid in the examination of questions arising under State laws. [*Reporter.*]

The Carl Schurz.

THE CARL SCHURZ.

DISTRICT COURT—WESTERN DISTRICT OF TENNESSEE—
JANUARY 27, 1879.

1. SALVAGE—ALLOWANCE.—The court will not allow the whole net proceeds in the registry as compensation to the salvor, even when his actual expenditures exceed the amount of the fund, except in cases where the owner abandons the property and neglects to reclaim it by appearance in the suit.

2. SAME—SAME—CASE IN JUDGMENT.—Where the proof showed that a sunken vessel, after being raised, was worth \$1,700, but being sold *pendente lite* she brought only \$792; and that the libellant actually expended \$568.95, under circumstances which would ordinarily have justified an allowance of one-half the property, the court allowed only one-half the net proceeds in the registry.

3. SAME—LOSS BY DEPRECIATION IN VALUE.—A salvor must bear his share of the loss by depreciation in value. He is *sub modo* a joint owner, and in the absence of an express contract, he cannot recover on any theory of a debt due either by the owner or the property, with a lien to be satisfied, at all hazards, to the full extent of the proceeds in the registry.

H. C. Warrinner, for libellant, cited: *Post v. Jones*, 19 How. 150, 161; *Butler v. The Finis*, 4 Phil. 38; 4 Abb. Nat. Dig., p. 103, pl. 104; *The Zealand*, 1 Low. 1; *Spencer v. The Chas. Avery*, 1 Bond, 117; *210 Bbls. Oil*, 1 Sprague, 91; *The Waterloo*, 1 Bl. & How. 114; *The Rising Sun*, 1 Ware, 385; *The Jubilee*, 3 Hagg. 49; *The Bastian*, S. C. Rob. 323; *The Wm. Hamilton*, 3 Hagg. 168; *Derelict Unknown*, Id.; *Brig Susan*, 1 Sprague, 91; 2 Pars. Ship., 263, 281, 310, 312.

R. Dudley Frayser, for claimants, cited: *Brig Minnie Miller*, 6 Ben.; *The John Perkins*, 3 Ware; *The Speedwell*, Id.; *The Acorn*, Id.; *The Waterloo*, 1 Blatch. & How. 126; *The Comanche*, 8 Wall. 448-473; *Two Anchors and Chains*, 1 Ben. 80.

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HAMMOND, J.—The question reserved at the hearing grows out of the following state of facts: The libellant raised the sunken vessel at an actual expenditure, as he testifies, of \$568.95, for labor of hands employed by the day, hire of flats, crabs, jacks, and other tools employed in the work, and the compensation of a diver and his assistants. The vessel was not derelict, her owner and captain remaining all the time during the work with the boat. I think there is no doubt that the preponderance of the proof shows that too much time was expended by the libellant in the work, and that it could and should have been accomplished at a much less cost than the libellant incurred, but it is difficult to say from the proof at how much less it could have been done. The estimates made by the witnesses, under the circumstances they detail, are entirely unsatisfactory. It was mere guessing on their part. The proof establishes the fact that the boat, which was a very small steamboat, converted from a barge, was worth, at the time of the disaster, not more than \$2,000, and that the repairs put on her after she was raised cost from \$200 to \$300; that is, the repairs necessary to cover the damage done by the sinking and raising, and not taking notice of the repairs which were in the nature of betterments. This would make her value in the hands of the salvor, after she was raised, not less than \$1,700. When we consider the danger of a total loss from the perilous position in which the vessel was placed by the disaster, the difficulties in the use of crude appliances for performing the service which seem to have been the best that were available, the cold weather and running ice during part of the time, and the actual expenditure of money, as above stated, which is found by aggregating from the libellant's account, as he proves it, the sums paid out by him, and leaving out of view the other charges made for his own services and hire of his own tools, I think one-half of the value of the boat,

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which was comparatively of small value at best, not too much to be allowed as compensation to the libellant. This would be very nearly the exact amount he claims by the account which he tenders as a statement of the expenditures he made and the value of his services as estimated by himself for the purpose of aiding the court in fixing the allowance of salvage, if we include the charges for his own services and the use of his own tools, and are to make the allowance on the basis of value as shown by the proof in the case, say on a value of \$1,700. But the libellant, having seized the vessel by process in this case, on his application, some ten or fifteen days afterwards, she was sold *pendente lite*, while almost imbedded in the ice, at an unfavorable time and under unfavorable circumstances, so that she only brought \$792, which is the sum in the registry to answer costs and for distribution between the salvor and the owners. It is not certain that if the property had been kept in the control of the marshal until more favorable weather for a sale it would have brought any more. So far as the proof is concerned, it is all speculation, but I think it is fairly inferable from the circumstances shown by the proof that, owing to the inauspicious conditions, the vessel has been sold for much less than otherwise she would have brought.

The libellant claims that his compensation should be fixed on the value as shown by the proof and not the sale, or else that the proportion should be so increased as to give him a larger amount than one-half the net proceeds in the registry, and that, under no circumstances, should he be allowed less than his actual expenditures of money. This would exhaust the whole fund, leave nothing for the owners, and throw all the loss of the unfortunate sale on them.

I do not think the element of time between the raising and selling of the vessel is at all material. It is not probable that she would have sold for any more on the day she was

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raised than she did fifteen days subsequently, and, therefore, it is merely another mode of claiming on the actual value, as shown by the proof, to argue that a salvor is entitled to recover on the value at the time of the service and not on any subsequent value. For all practical purposes the date of the service and date of the sale are the same in this case.

The question remains whether the court can look beyond the fund in its hands in estimating the value of the property. If the depreciation grows out of the misconduct of the parties in possession, whether it be the owner or the salvor, I have no doubt that misconduct may enter as an element into the judgment of the court in making the allowance; but there is no misconduct here, unless it may be that the action of the libellant in pressing a sale at an unfavorable time may be so considered. There is nothing in the proof to show whether this was bad conduct or not, for it may be the expense of keeping the property, or the danger of losing it by delay, made a speedy sale a necessity. Let this be as it may, I shall treat the case as one without fault on either side in respect of the sale, because the proof does not show otherwise.

Neither do I think it just to treat the disastrous sale as the result of the failure of the owners to bond the property, as it is called. There is nothing to show that they could have given a stipulation for her value, and if there were, it is not a right the libellant has to a bond, but it is entirely optional with the owners whether they give bond or leave the property with the court. In cases where the owner abandons his property to the salvors, makes no claim, or is unreasonably long in asserting his rights, the court may, undoubtedly, decree the whole to the libellant. *The Zealand*, 1 Low. 1; *Two Anchors and Chains*, 1 Ben. 80.

It is very earnestly insisted that the element of "reward" and not entirely that of compensation, is the rule for allow-

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ance of salvage. In meritorious cases on the high seas, and perhaps there may be cases on the rivers, this element is often controlling. Here we have a case of a steamboat snagged at her landing in this port, impaled upon a sunken wreck at the shore, and tied by her cables near her usual landing place. The salvor goes to her relief at the request of the captain, and after much hard work and unnecessary delay he succeeds in getting her afloat and pumping her out. It does not seem to me that it is a case calling for anything in the way of reward as understood in the admiralty courts, but if it were, it would be going to an unreasonable length to reward a salvor, however meritorious, with the *whole* of the property. As was said by the learned judge in *The Waterloo*, 1 Blatch. & How. 114, 127, this would be a return to the barbarous practice of giving the finder all he finds. I do not find any case where the court allows all the property to go to the salvor unless the owner is either unknown, or has voluntarily abandoned the claim he has to the property saved.

A salvor, in the view of the maritime law, has an interest in the property; it is called a lien, but it never goes, in the absence of a contract expressly made, upon the idea of a debt due by the owner to the salvor for services rendered, as at common law, but upon the principle that the service creates a property in the thing saved. He is, to all intents and purposes, a joint owner, and if the property is lost he must bear his share like other joint owners.

This is the governing principle here. The libellant and the owners must mutually bear their respective share of the loss in value by the sale. If the libellant has been unfortunate and has spent his time and money in saving a property not worth the expenditure he made, or if, having saved enough to compensate him, it is lost by the uncertainties of a judicial sale for partition, so to speak, it is a misfortune

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not uncommon to all who seek gain by adventurous speculations in values. The libellant says in his testimony that he relied entirely on his rights as a salvor. This being so he knew the risk he ran and it was his own folly to expend more money in the service than his reasonable share would have been worth under all circumstances and contingencies. He can rely neither on the common law idea of an implied contract to pay for work on and about one's property what the work is reasonably worth with a lien attached by possession for satisfaction, nor upon any notion of an implied *maritime contract* for the service, with a maritime lien to secure it, as in the case of repairs, or supplies furnished a needy vessel, or the like. In such a case the owner would lose all if the property did not satisfy *the debt*, when fairly sold. But this doctrine has no place in the maritime law of salvage. It does not proceed upon any theory of an implied obligation, either of the owner or the *res*, to pay a *quantum meruit*, nor actual expenses incurred, but rather on that of a reasonable compensation or reward, as the case may be, to one who has rescued the *res* from danger of total loss. If he gets the whole, the property had as well been lost entirely, so far as the owner is concerned. *The Joseph Stewart*, Crabbe Rep. 218, 220. I think the public policy of encouragement for such service does not, of itself, furnish sufficient support for a rule which would exclude the owner from all benefit to be derived from the service. The property is saved for him, not the public, and he cannot be said to have impliedly authorized his whole property to be exhausted in saving it, particularly where he has not abandoned it, and it is not derelict.

The property and the owner would generally be at the mercy of the salvor, if such a doctrine be established, and the temptation to so conduct the service as to absorb the whole property, very great.

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After the payment of costs let the proceeds in the seizure be equally divided between the libellant and the claimants.

I take pleasure in saying that Judge BROWN, of the Eastern District of Michigan, now with us, concurs in this opinion.

HENRIETTA WOOD v. ZEB. WARD.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—FEBRUARY
15, 1879.

1. **ESTOPPEL BY RECORD.**—A slave could not sue, nor be sued, while slavery existed in the slave States. Where, therefore, the judgment of a court was against one who, being kidnapped into slavery, brought suit to regain liberty, the court holding that plaintiff was a slave and not a free person as claimed, such judgment will not estop plaintiff from a re-examination of the same question in a subsequent suit brought against the kidnapping party.

2. **ESTOPPEL MUST BE MUTUAL.**—Mutuality is an essential ingredient in all estoppels; slaves are not answerable civilly; are subject to no suit; no civil liability can attach to them; they can neither be bound by covenant, nor hindered by estoppel, nor will the law allow them to claim the benefit of an estoppel against others.

3. **JUDGMENT RENDERED AGAINST A SLAVE NULL AND VOID.**—A judgment rendered against a slave, where he appears in an action, is a nullity. No one can be concluded by a judgment or decree rendered in a judicial proceeding, which he had no legal capacity to prosecute or defend.

4. **HOW AND WHEN SUITS FOR FREEDOM WERE ENTERTAINED—LOSS OF JURISDICTION.**—Suits for freedom were entertained in the slave States, but upon the idea that the party suing was free. If free, he had a right to sue, but when the court reached the conclusion that he was a slave, that was the end of the litigation for the want of a competent plaintiff, and the proceeding was dismissed without further inquiry.

On motion for new trial.

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The facts are stated in the opinion.

Lincoln, Smith & Stephens, appeared for plaintiff.

Hoadly, Johnson & Colston, for defendant.

BAXTER, J.—The plaintiff is a woman of color. For several years prior to her removal to Cincinnati, she resided with a Mrs. Cirode, in Louisville, Ky., as a slave. About 1847 Mrs. Cirode left Louisville, taking the plaintiff with her and settled in Cincinnati, where she executed and delivered to the plaintiff a formal instrument of emancipation. Thus the plaintiff became, so far as Mrs. Cirode, her apparent owner, could confer the boon, a free person, endowed with all the rights and immunities incident to freedom. And from that time until the restraint imposed by the defendant, to be hereinafter fully stated, the plaintiff remained in Cincinnati, in the undisputed and undisturbed enjoyment of personal freedom.

We infer, however, from the depositions given in another suit, (but which are not evidence in this case) to be hereinafter mentioned, between these parties in Kentucky, that the children of Mrs. Cirode claimed some title to or interest in the plaintiff, as a slave, conjointly with or adversely to their mother's title; and that they repudiated their mother's action in the premises, and desired to regain possession of her. But no active steps seem to have been taken to effect that object until the spring of 1853. At or about this time they united in a conveyance, in and by which they professed and assumed to convey the plaintiff as a slave to the defendant in consideration of \$300 to be paid in the event he succeeded in obtaining possession of her. The defendant then resided in Covington, Ky. Shortly after said conditional sale, the plaintiff was inveigled by one Rebecca Boyd, in whose service she was then employed, across the Ohio river and into the

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State of Kentucky, where by chance or pre-arrangement they were met by defendant, who claimed the plaintiff as his slave, forcibly restrained her of her liberty, and sent her back to Lexington, and had her there confined in a private slave prison belonging to one Lewis C. Robards.

Whilst thus imprisoned, to-wit: on the 10th of June, 1853, a petition was filed in the Fayette County Circuit Court in plaintiff's name, for the purpose of regaining her liberty. In it she averred that she was a free woman. To this petition Lewis C. Robards, the proprietor of the prison in which she was detained, was made a defendant. But at defendant's instance an interlocutory order was soon after entered in the cause, substituting the defendant "Zeb. Ward as a defendant in the place of Lewis C. Robards," and dismissing her petition as to Robards.

The defendant Ward then answered, and in his answer alleged "that the plaintiff was not a free woman, but his slave."

Upon the issue thus made proofs were taken and the case regularly heard, when a final decree (24th June, 1854) was entered in the following terms: "This cause having been heard and the court advised, decrees and orders that the plaintiff's petition be dismissed."

From this decree the plaintiff appealed to the Court of Appeals.

There is no transcript of the record from the Court of Appeals, and consequently we are not advised of the action of that court, except in so far as the same is supplied by the record offered from the Fayette County Circuit Court. From this we see that, on the 13th day of February, 1855, the following entry was made in said last named court: "The defendant, Zeb. Ward, produced a mandate of the Court of Appeals, which is ordered to be recorded as follows: 'Court of Appeals, January 20, 1855. Henrietta Wood, appellant,

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vs. Zeb. Ward, appellee. Appeal from a judgment of the Fayette Circuit Court. The court being sufficiently advised, it seems to them that there is no error in the judgment. It is therefore adjudged that said judgment be affirmed, which is ordered to be certified to said court.'"

Here the litigation between these parties in Kentucky terminated. Whereupon the defendant, soon after the termination, sold the plaintiff to one Wm. Pulliam. He caused her to be conveyed to Mississippi and sold to one Girard Brandon. Brandon continued to subject her to his service in the States of Mississippi and Texas until the latter part of 1865, and until she was emancipated by the Thirteenth Amendment to the National Constitution. On being thus the second time emancipated from slavery, the plaintiff began preparations to return to her home in Cincinnati, but owing to various hindrances, not necessary to be enumerated here, she did not get back to Cincinnati until some time in the year 1869.

During all this time, from 1853 to 1870, the defendant resided in Kentucky and Tennessee. He visited Cincinnati in 1870, when this suit was instituted. Plaintiff's petition, which, under the practice in Ohio, is filed as a substitute for a declaration, embodies substantially the facts hereinbefore stated—except those connected with the Kentucky litigation.

The defendant's answer interposed three defenses: First, a general denial of the facts charged; second, the statutes of limitation; third, the adjudication of the Kentucky court hereinbefore referred to.

The plaintiff replied, and the issues thus made came on and were tried at the last April term, 1878, before the Honorable the District Judge and a jury, resulting in a verdict for the plaintiff, and an assessment of \$2,500 damages.

The defendant then moved for a new trial, and it is this motion that is now before us for determination.

Defendant's exceptions upon the trial were numerous. He

excepted to the rulings of the judge on questions of admitting and excluding evidence, as well as to his instructions given in relation to the statutes of limitation, and in relation to the force and effect of the decree rendered in Kentucky, and pleaded and relied on as a defense to this action.

We have neither the time nor the inclination to discuss in detail all the exceptions that were taken, nor is it, in our judgment, necessary for us to do so. If the court fell into error in the admission or exclusion of testimony, or indulged in instructions upon immaterial and abstract matters, the errors in no way affect the merits of this controversy, or prejudice the defendant's right. With the charge relating to the statutes of limitation we are entirely satisfied. The real contest, as we think, arises out of the defendant's third defense, to-wit: "Is the plaintiff, by reason of the decree rendered in her suit, by the Fayette County Circuit Court of Kentucky, precluded from a re-examination in this court of the same question decided in that case?" If she is, then that judgment is a full and complete defense to this action.

The question is an important one, and deserves, as it has received, the most thorough consideration.

The facts, as we have detailed them, present a case of peculiar and complicated oppression. The plaintiff was quietly, and, as she believed, securely domiciled, under the protection of the laws, in a community friendly to her aspirations, and within a jurisdiction which prohibited slavery, and presumed everything in favor of freedom. But while thus reposing in confidence she was, by false pretenses, decoyed into Kentucky, and there enslaved by violence. It was a most grievous wrong to have been thus betrayed into a distant and unfriendly jurisdiction, in which her color was *prima facie* evidence of servility, and forced to submit to the deprivation of liberty, or litigate in a tribunal where the presumptions of law, supposed public policy and established

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prejudices of long standing, combined to defeat her claim. And when to these we add that, pending the controversy, the plaintiff was *prima facie* under the ban of slavery with all attendant disabilities, left in defendant's custody, subject to his unrestrained will and amenable to his punishment, and without the means necessary to defray the expenses of litigation, her wrongs appear more and more obvious, and appeal strongly to the sympathies of the court for redress.

But these considerations cannot prevail with the court unless a remedy can be found within recognized legal principles. A judge dare not know any code of morals higher than the Constitution and the laws enacted in pursuance of that instrument. These, as they then existed, not only recognized, but protected the slave owner in the enjoyment of that species of property, and we must administer the law as it then existed, uninfluenced by the subsequent change in public sentiment on this interesting subject.

By the National Constitution—the instrument under and in virtue of which we hold our office—we are required “to give full faith and credit to the records, public acts and judicial proceedings” of the several States. It follows that the decree of the Kentucky court is entitled at our hands to the same force and legal effect that ought, under the laws of Kentucky, to be accorded to it in that State. The question therefore narrows itself down to the single inquiry: does the decree rendered by the court of Kentucky and here pleaded and relied on as a bar to this action forever preclude the plaintiff from a re-examination of the issue decided in that case? If it does, as we have already said, it is a complete defense to the plaintiff's present suit.

Judgments of courts are not always conclusive upon the litigant parties in collateral or other proceedings. The jurisdiction of the court is always open to inquiry. In order to confer jurisdiction the suit must be by and against parties

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competent to sue and be sued. But the plaintiff was repelled by the Kentucky court, on the ground that she was a slave. If a slave, she was a chattel, a mere piece of property, without civil rights, and incompetent to prosecute or defend a suit. *American Cyclopædia*, Vol. 14, title "Slavery," page 92. This status is inseparably connected with slavery, and has prevailed in the slave-holding States of the Union, including Kentucky, from the time slavery was first legalized to the abolition of the institution in 1865.

Their disabilities have been iterated and reiterated by the courts in a uniform current of decisions, covering almost every possible phase of the subject. Where a slave finds lost property, it inures to the benefit of the master until the true owner can be found. *Brandon v. The Huntsville Bank*, 1 Stew., Ala. 320. A special plea that either plaintiff or defendant is a slave is a good plea in bar. *Avery v. Smith*, 1 Litt. Ky. 326, and *Bentley v. Cleveland*, 22 Ala. 814.

Slaves cannot appear as suitors, either in courts of law or equity. *Bland v. Dowling*, 9 Gill. & J. (Md.) 19. Nor can a master sue his slave. *Catchie v. Circuit Court*, 1 Mo. 608. Slaves are incapable of entering into valid contracts, or of taking property, by demise or otherwise, to themselves, directly or through the intervention of a trustee. *Hall v. Mullen*, 5 Har. & G. (Md.) 190; *Taylor v. Embry*, 16 B. Monroe, (Ky.) 340; *Trotter v. Blocker*, 6 Port. (Ala.) 269; *Lamb v. Gertman*, 26 Ga. 625; *Graves v. Allen*, 13 B. Monroe, (Ky.) 19; *Jones v. Lipscombe*, 14 B. Monroe, (Ky.) 296; *Turner v. Smith*, Id. 417; *Hinds v. Brazcoll*, 3 Miss. 837, and *Cunningham v. Cunningham*, C. & N. (N. C.) 553.

Even a bond executed by a slave, with a free man as surety, is against public policy and void. *Batten v. French*, 4 Jones, (N. C.) 232. Money acquired by a slave by permission of his master, inures to the latter. *Jenkins v. Brown*, 6 Humph. (Tenn.) 299.

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Courts of chancery, with their ample powers, cannot enforce a contract between master and slave, though fully performed on the part of the slave. 1 Leigh. (Va.) 72. And a conveyance of lands and slaves in trust, to allow the slaves to occupy and receive the rents of the land, and the profits of their own labor, is void. *Smith v. Betty*, 11 Gratt. (Va.) 752. It is not felony in Georgia, by the common law, to kill a slave. *Neal v. Farmer*, 9 Georgia, 555. It is lawful to track runaway slaves with dogs, provided it is done with caution and circumspection. *Moran v. Davis*, 18 Georgia, 722. They are recognized, in a restricted sense, as human beings, in this: "Masters have no right to inflict such cruel and inhuman punishment, even to enforce obedience, as must result in death or loss of limb as a consequence of the punishment. *Craig v. Lee*, 14 B. Monroe, (Ky.) 119.

But unconditional submission of the slave is due to the authority of the master; and the master may, therefore, use such force and means as may be necessary to enforce submission to his authority, even to the destruction of life or limb of the slave. *Oliver v. State*, 39 Mississippi, 526. The law of slavery is absolute authority on the part of the master, and unconditional submission on the part of the slave. And the master may punish the slave at will, in such manner and degree as his judgment and humanity may dictate, provided he does not maim or kill. *State v. David*, 4 Jones, (N. C.) 535. The right of the master to obedience and submission in lawful things is perfect. The power to inflict any punishment not affecting life or limb, which the master considers necessary to enforce obedience to his commands, is secured to him by the law. Now, if in the exercise of his authority, the slave resists and slays the master, it is murder, and not manslaughter, because the law cannot recognize the violence of the master as a legitimate provocation. *Jacob v. State*, 3 Hump. (Tenn.) 493.

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Mutuality is an essential ingredient in all estoppels, and as slaves are not answerable civilly; as they are subject to no suit; as no civil liability can attach to them, and they can neither be bound by covenant nor hindered by an estoppel, the law will not allow them to claim the benefit of an estoppel against others. *Bently v. Cleveland, supra*. A judgment rendered against a slave, in an action in which he appeared, is a nullity. *Stenhouse v. Barnum*, 12 Rich. (S. C.) 620.

From these authorities, which might be indefinitely extended, it will be seen that although slaves are protected as persons against the destruction of life and limb, they are in all other respects treated as property, and subjected to all the disabilities incident to that condition. They are without power to contract, to acquire, or hold property, sue or defend a suit. And being without capacity to sue or defend, no valid judgment can be rendered against them. It would be an anomaly to hold that any one could be concluded by a judgment or decree rendered in a judicial proceeding which he had no legal capacity to prosecute or defend.

It is true that such a suit was brought by the plaintiff, and prosecuted in her name, and that the Kentucky court did entertain, sit in judgment upon and decide it. Similar suits were not infrequent in the courts of the slave States. But these suits were always entertained upon the allegations that the plaintiff was free. If free, the plaintiff had a right to sue; but when the question of freedom was traversed, and put in issue, it was equivalent to denying the plaintiff's right to sue, and whenever the court reached the conclusion that the plaintiff was a slave, the litigation, whatever its scope, necessarily ceased for the want of a competent plaintiff. In other words, the courts held there was no suit pending, and dismissed the proceeding without further inquiry. In *Bentley v. Cleveland, supra*, the court ordered the allega-

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tion that complainants were slaves to stand as a plea to be first disposed of before it would take cognizance of the other parts of the complaint. The same principle, as we understand the record, was applied by the Kentucky court to the proceeding instituted by the plaintiff against the defendant. Plaintiff alleged her freedom. This, *prima facie*, gave jurisdiction. But as soon as the court reached the conclusion that plaintiff was a slave, it found itself without jurisdiction for the want of a plaintiff competent to sue, and did the only thing which, under the circumstances, it could have done—struck the case from the docket. The decree simply dismisses plaintiff's petition. There is no declaration of facts, no special findings, no judgment for costs, and no execution awarded.

In the opinion of the court, the plaintiff was defendant's property. She, and all she had, and all that she might afterwards acquire, belonged to him.

To permit such a decree, obtained under such circumstances, against a human being, for the time treated as a chattel, and without legal capacity to sue, to operate as a bar, or an estoppel, and conclude the plaintiff in a matter of such vital importance as is involved in this case, would be a just reproach to the jurisprudence of any country.

On the trial of this case in this court, the plaintiff offered full and satisfactory evidence of her freedom at the time of the committing of the several grievances complained of, whilst defendant offered no opposing testimony. He rested his case wholly on the judgment pleaded and relied on by him. As this judgment does not, in our opinion, conclude the plaintiff, the verdict of the jury must stand. The damages are not excessive; the motion for a new trial will be disallowed, and judgment entered thereon in plaintiff's favor.

The learned judge uses the present tense in making quotations from decisions in slavery cases, but the reader will understand them all in the past tense.

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In Tennessee, to maim a slave was felony. The writer remembers a case where a wealthy man was sent to the State prison for this offense. The master was liable to be indicted for cruel and inhuman treatment upon a slave. See *Worley v. The State*, 11 Hump. 172. So exposure of slave by master to inclement weather with intent to injure him, was a felony. Code, Vol. 2, 831, Sec. 4620. Kidnaping, by Sec. 4621, was, likewise, a felony. The owner of a slave, on a trial of his slave, could attend and aid in his defense, challenge jurors, etc.—Sec. 2634. The law is correctly stated in the foregoing opinion as to his general disability.

This, as it obtained in the Southern States, was the same that has existed in most countries, ancient or modern. Yet it is curious to note that in the dependencies of the Crown of Spain, it was and is much more liberal than in most States. If the reader will examine *Las Leyes de las Indias*, and the Royal ordinances for the government of Cuba and Porto Rico, promulgated by the Spanish Government, he will learn that a slave in those islands can contract with his master for his freedom. More than that, he may pay his master on account, any sum of money on hand, and have a credit therefor on his purchase of himself. Further, he may buy himself outright, and if his master will not agree to a reasonable price, he can compel him to go before the *syndico*, an officer who is a sort of trustee as well as judge, by whom the price will be settled. And should the slave be maltreated, he may complain to the same officer, and if the latter thinks a proper case has been made out, he will compel the master to make sale of the slave to another, the slave, in such case, being permitted to choose his master. [Reporter.]

Chester et al. v. Wellford et al.

ROBERT I. CHESTER AND OTHERS v. C. B.
WELLFORD AND OTHERS.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—FEBRU-
ARY 22, 1879.

1. REMOVAL—PRO CONFESSO NO BAR.—A *pro confesso*, taken by complainant at return term, does not operate to prevent the removal of a cause, under the act of 1875, into the Federal Court.

2. INDISPENSABLE PARTY—TRUSTEE NOT SUCH.—The jurisdiction of the court cannot be defeated because the plaintiff cannot obtain full relief by the suit brought as to all parties against whom relief may be needed, but only when it cannot be had against a non-resident defendant without the presence of some resident defendant, whose presence is indispensable.

3. REMOVAL OF CAUSES—CASE IN JUDGMENT.—Where a citizen of Tennessee filed a bill in equity against an insurance company chartered by Missouri to cancel certain policies of insurance, loan and interest notes for an account of premiums and dividends and to enjoin a sale of his land under a deed of trust given to secure the loans, and the trustee was a citizen of the same State with the complainant: *Held*, that the cause was removable as a controversy wholly between citizens of different States, and that the trustee was not an indispensable party

J. B. & F. H. Heiskell, for plaintiff.

Wright & Folkes, for defendants.

Motion to remand.

HAMMOND, J.—This bill in equity was filed in the Chancery Court of Madison County, November 29, 1877, process and publication being returnable to January 7, 1878, the first day of the next succeeding term. On the fourth day of the term, no answer being filed, a *pro confesso* was taken by the plaintiff before the clerk and master, and the cause set for hearing by him, *ex parte* under the provisions of the Code of Tennessee, section 4370, which enacts that in such a case

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"the cause may be set for hearing at the return term of the process."

Subsequently, and on January 14, 1878, at the same term, the court by consent of parties set the *pro confesso* aside, and the defendants answered separately. The Life Association of America, the non-resident defendant, filed its petition and bond for the removal of the cause into this court, on June 28, 1878, prior to the next succeeding or July term of the court. The first ground of the motion to remand is that the petition to remove was filed too late. The act of Congress of March 3, 1875, 18 Stat. 470, requires that the petition for removal shall be filed "before or at the term at which said cause could be first tried and before the trial thereof." It is argued that this was the January term, 1878, because the cause having stood for hearing on the *pro confesso* at that term it was the one at which it could have been first tried, and that the subsequent action of the court setting aside the *pro confesso* has not changed this attitude of the case.

It will be observed that this order *pro confesso* was taken on the very first day on which the defendants were in default for want of an appearance, namely, the fourth day of the term at which the process was returnable. Code, 4350. If by taking this advantage the plaintiffs be allowed to defeat a removal of the cause into this court, it comes to this, that the defendant must file his petition for removal, or otherwise make his appearance, on or before the first moment of the first day on which he would be in default for want of such appearance, or it is within the power of the plaintiff to altogether defeat the right secured to him by this act of Congress, and this although the court may subsequently, on good cause shown, set aside the *pro confesso* and permit him to make his defense. Code 4375. And so the right of the plaintiff to a removal may be defeated by the defendants

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taking some such advantage of his first default. In practice this would furnish a very effectual means of circumventing the act of Congress solely by the prompt action of the adverse party in taking advantage of defaults; and that too for no other purpose than that of defeating this right of removal; because, for all other purposes the default could be avoided, while for this only it would become irrevocable, as the jurisdiction of this court is entirely gone if once defeated by such means. And thus, no matter how good may be the excuse for suffering a default, while sufficient to justify the court in requiring that no advantage shall be taken of it for any other purpose, it becomes ineffectual to avoid the absolute forfeiture of the right of removal. It seems to me that it was not intended, by the phraseology used in the act, and relied upon here, to place the right of removal so completely at the mercy of the adverse party. The right would be of little value if it could be so readily defeated by an adversary on the alert to prevent its exercise. See *Hunter v. Royal Canadian Ins. Co.*, The Reporter, (Houghton & Osgood,) vol. 7, p. 37.

I think the right of either party to remove a cause into this court under the act of 1875, is not within the control of the other party by any proceeding he can take prior to a final disposition of the cause. If a party seeking a removal has been guilty of such *laches* as entitles his adversary to a final judgment in the State Court before the petition for removal has been filed, it may be that he cannot file the petition till after he has by proper proceedings reinstated his right to appear and defend, but whenever he has that right and issues are made up for adjudication by the court, he may remove those issues into the Federal Court, by filing a petition and bond for that purpose at the first term of the State Court at which the suit is triable by the practice of the court, and before the trial thereof. Taking a decree *pro*

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confesso is in no sense a trial of the cause, as the taking of a judgment by default was held to be in construing this act of Congress in the case of *McCallon v. Waterman*, 4 Cent. L. J. 413; for, by the very sections of the Code relied on here, notwithstanding the case was set for hearing at the return term it remained to be tried, and until final decree the court had full power to reinstate the defendant to all his rights of defense. Code 4370-4375. And, after the *pro confesso* was set aside the cause stood as if it had never been taken, and the first trial term was that which first came after answer filed and the expiration of the six months allowed the parties to take their proof; certainly not earlier in any event than the next succeeding term after the filing of the answer. Code 4375, 4401, 4432, Chancery Rules, No. 2, § 4. I think after a very careful consideration of the cases cited by the learned counsel for the plaintiffs, there is no conflict between those rulings and that I make here; but it would extend this judgment beyond proper limits to enter into any elaborate analysis of the facts upon which those adjudications rest. See *Ames v. C. C. R. R.*, 4 Cent. L. J. 199; *Scott v. C. S. R. R.*, 6 Biss. 536; *McCallon v. Waterman*, 4 Cent. L. J. 413.¹

The second ground for the motion depends upon the allegations of the bill and the nature of the controversy. The bill sets out that the plaintiffs insured their lives in the defendants' company by paid up policies for ten thousand dollars each. That in payment of the premiums, which amounted to \$10,582.60, and for the further consideration of a loan by the company to them of \$7,500, they executed their note for \$18,082.30, due in five years, and likewise semi-annual notes for the interest at 10 per cent. To secure these notes they executed a deed of trust to the resident

¹ 1 Flippin, pp. 658-654.

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defendant, Wellford, as trustee, authorizing him in default of payment and at the request of the company to sell the lands conveyed and pay the notes. And because of the allegations of fraud contained in the bill the plaintiffs seek a rescission of the contract and to recover back the money paid to the company; or else for an account with the company to adjust an alleged equity to have certain credits which are claimed applied to the full satisfaction of the notes which are alleged to have been fully paid.

The bill asks no relief against Wellford, who resides in this State, except to enjoin him along with the defendant company from selling the land under the trust deed. .

The plaintiffs insist that they cannot get along against the insurance company without the presence in the suit of Wellford, the trustee; that this is, therefore, not a controversy which is wholly between citizens of different States that can be fully determined between them in this court; and that for that reason it is not within the acts of Congress either of 1866 or 1875. While the trustee is no doubt a proper party to the bill, I think he is not an indispensable party to the relief here prayed against the non-resident defendant. His presence is not in any way essential to a decree cancelling the notes, nor to a decree for an account with the insurance company, and all these matters can be adjudicated without him. Nor is it necessary to have him here in order that the insurance company may be perpetually enjoined from ever settling up or claiming any benefits under the trust deed and from seeking in any way to enforce it by a request for a sale or otherwise; and by such a decree, it seems to me very clear, that the controversy between the plaintiffs and the insurance company can be fully determined *as between them*, without having the trustee here. It is said he has the legal title to the land and that it is necessary to have him here to divest himself of it in order that the plaintiffs may have full relief.

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I do not understand that the jurisdiction of this court can be defeated because the plaintiffs cannot get full relief by the suit here as to all parties against whom they may need relief; but only when they cannot get full relief as against the non-resident defendant without the presence in court of some resident defendant whose presence is indispensable. If the contract of the plaintiffs with the insurance company is rescinded and the notes secured are cancelled, or if on a proper accounting they are decreed to have been satisfied, there is but little if any need of having Wellford here to divest title. After such a decree if his title were not divested *ipso facto*, it would be the most naked and harmless of titles. It would probably under our law divest *ipso facto* by such a decree, or rather to be entirely accurate, the existence of the facts which entitle the plaintiffs to a decree cancelling the notes have already divested the trustee of his title. Technically it could only revert by a reconveyance of the trustee, or by decree upon foreclosure. But it has been held, and is well settled, that it cannot be set up against the mortgagee after the debts secured by it are paid by him, even at law. *Carter v. Taylor*, 3 Head. 30; *Peltz v. Clarke*, 5 Peters, 481; *Breckinridge v. Ormsby*, 1 J. J. Marsh. 237, 257; *Williams v. Neil*, 4 Heisk. 279, 283.

The draughtsman of this bill did not, it seems, think the divestiture of the trustees title necessary, for it contains no prayer to that effect. The injunction sought against him is only incidental, the injunction against the beneficiaries being equally effective. But I do not put my judgment on this ground alone. Even if the injunction against the trustee is necessary—and to divest him of title is necessary to complete plaintiffs' relief; and moreover if plaintiffs have to bring another suit to accomplish it, I hold that the jurisdiction of this court will not be refused to avoid a multiplicity of suits. The only inquiry here is, not whether

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Wellford is a proper party, or one necessary to plaintiffs' full relief, but whether he is an indispensable party to the bill in order to afford the plaintiffs the relief they ask *as against the non-resident defendant*. The case of *Gardiner v. Brown*, 21 Wall. 36, is not in point. There the relief sought was a foreclosure of the mortgage and the presence of the trustee was indispensable to afford that relief. Not so when the case is reversed and the object is to rescind the contract or cancel the notes because they have been paid. In such a case the trustee is at most only a proper party. Such nominal parties cannot oust the Federal Courts of jurisdiction. *Wood v. Davis*, 18 How. 468.

It is not necessary for me to determine now whether the trustee has been brought here by this removal. He has not joined in the petition, and is not here asking to have that question determined. It will be time enough at the final hearing, if any relief is asked as to him, to determine whether it can be granted. As to the controversy between him and the plaintiffs he is either enjoined in the State Court or here, and that is all the plaintiffs have asked as to him. If he should appear here and move to dissolve the injunction, the plaintiffs can then take the objection that the court has no jurisdiction as to him. If he should move a dissolution in the State Court, that court will determine whether it has jurisdiction as to him. Not having joined in the petition and bond for removal, the question whether he has been brought along by the removal made by his co-defendants cannot arise on the motion to remand made upon the filing of their petition. Not until he takes some step assuming a jurisdiction over him, or the plaintiffs some step, asserting it, will the question properly arise. Until then, at least, I shall not be tempted to "assume the truth of the maxim that it is the duty of a good judge to enlarge his jurisdiction," as it has been said the Federal judges generally

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do, by a learned State judge, who, somewhat loath, perhaps, to part with his own, has in a very able opinion, cited in argument here, denied, in such a case, any jurisdiction in this court over a controversy between residents of the same State. See *Smith v. St. Louis Mutual Life Ins. Co.*, 2 Tenn. Ch. Rep. 656, 665. Mr. Justice MILLER, in *Taylor v. Rockafeller*, 6 Reporter, (Hurd & Houghton, publishers, Aug. 21, 1878,) 226, has intimated a contrary opinion, but I need not now decide the point.

I cordially assent to what has recently been said by the Supreme Court of Alabama as to the considerations which should actuate the courts in the determination of these questions: *Per* MANNING, J.—“The acts of Congress for the removal of causes from the courts of the States to those of the United States, require on the part of the judges of either government, who may have to consider and act under them, candor and good temper. Jealousy of jurisdiction, when too susceptible of alarm and resentment, is apt to hurry those under its influence into error. The institutions of both governments are established for the good of all; and it is the right of all to have them preserved and upheld in the performance of their respective proper functions. When, therefore, cases arise in which the question to be decided is, whether the cognizance of them belongs to the State Courts or the Federal Courts, it is the dictate of patriotism, as well as of law, that jurisdiction shall be cheerfully declined by those to which it does not pertain, and exercised without offensive arbitrariness by those entitled to exercise it. According to the Supreme Court of the United States, through the late Chief Justice CHASE, ‘It may be not unreasonably said, that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution, as the preservation of the Union and the

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maintenance of the National Government.' *Texas v. White*, 7 Wall. 700." *Ex parte Grimbail*, 8 Cent. L. J. 152.

The motion to remand is denied.

On the point that after order *pro confesso* it is not too late for petition for removal, read *Hunter v. Royal Canadian Ins. Co.* The Reporter, vol 7, p. 87.

HELENA WOLFF v. THE CONNECTICUT MUTUAL
LIFE INSURANCE CO.

CIRCUIT COURT—EASTERN DISTRICT OF MICHIGAN—MARCH,
1879.

Although neither an act of suicide, nor an attempt, nor a threat to commit suicide alone creates such a presumption of insanity as would justify a jury in finding a party insane, such an act may properly be considered in connection with the previous demeanor and conduct of the party as an item of testimony tending to prove insanity.

Motion for a new trial.

The action was upon a policy of insurance, which insured the life of Henry Wolff, in the amount of \$2,000. Defense was made that the assured committed suicide; which was a risk not covered by the policy; to which the assured replied that he was insane at the time he took his life. The case was brought before a jury and a verdict rendered for the full amount of the policy and interest.

The motion was made for a new trial upon the ground that the evidence admitted to go to the jury to the effect that the assured was insane at the time he took his life, was improper.

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The evidence of insanity consisted of certain eccentric and temporary hallucinations, occurring from about a year and a half up to about three months before the suicide; the first of which occurred about a year and a half before his death when he was walking home, at noon, with his brother. The latter relates the incident as follows: "It had rained before, and there was a puddle of water standing on the sidewalk, and when he came there he slapped me on the arm and says, 'See! there is money, can't you see? I will make money out of that. That is the biggest thing in the world to make money out of.' I laughed at him, and I says, 'What is the matter with you, are you out of your mind, or what ails you?' 'Don't you see that dog,' he says, 'he is chasing me. Why he follows me all the time.' There was no dog there. He went to dinner as usual and returned to his work in the afternoon." At another time he awoke his wife in the night and wanted to know if she didn't hear singing outside. He said he thought he heard them singing just as in church. It appears that no person was there. Shortly after this incident he retired and went to sleep, and in the morning was up about his business as usual. His wife relates another occurrence as follows: "Then again he got up in the middle of the night when it was raining and thundering. When I woke up he was off. I didn't know where he was. I got up and made the light and waited about an hour and then he came, and he had been up on top of the house and was all wet. I didn't know where he was, and I asked him and he said he had been on top of the house. He did that two or three times in one summer, the last summer of his life. He said it was very nice on top of the house when it rained; he liked it. * * * Again: he woke up one night and wanted to go off; I had just been sick and I could not follow him. He got up in the middle of the night, in his night clothes—as I was I could not go—and took the key out of the door, and he

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got up and went off. He just put on slippers and went off with nothing on. About five o'clock in the morning a policeman came and wanted some clothes for my husband. He said they had him in the police station and they wanted some clothes for him to put on; he often did that nights. This was in the summer before his death." At another time his brother relates that "he came to my house very early in the morning, about five o'clock, knocked on the door and I got up out of bed and asked him what was the matter. He says, 'Can you see all those men out there? All these men want to kill me, every one of them. Don't you see them? Every one, straight up there on the whole street want to knock me down.' I says, 'What is the matter with you. Come here and sit down.' My wife gave him a cup of coffee and he sat down, but he talked of different things, took his coffee and went off. He went to work after breakfast as usual." On another occasion he came into the store in the middle of the afternoon, locked the door, and taking the key, went up stairs where his brother was and made some remarks betraying hallucination and temporary derangement. At another time he came up stairs where his men were at work and compelled one of the men to walk up and down the room briskly forty or fifty times. This was because he thought he had been slow about some errand. He bought a horse, after that, for \$120, but not being satisfied tried to sell him to his clerk for twenty-five cents. The clerk paid the money. At night when he went home he found the horse at his stable, Wolff having ordered his teamster to take him there. The next day the clerk says, "I told him I was only joking when I gave him the twenty-five cents; that I would like to have him take the horse back; 'No,' he said, 'I was sick of my bargain;' he did not want the horse; so I kept him. I offered it to him several times. He would not take it back until after he died, I gave it back to Mrs. Wolff." At another

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time his sister-in-law came with her husband, on Sunday, to his house. Wolff told her he did not want her there, and she must go home. This seemed strange to his wife as he had always before been glad to see her when she came. On the day he died, a female acquaintance and friend of the family came to visit at his house. Wolff sent her home, so much to his wife's chagrin that she went home with her. On her returning she found her husband lying upon the sofa with a discharged pistol in his hand. The testimony showed that several times within this time he threatened to take his own life, declaring to his brother that he would not live longer. He had returned home from his work on the occasion of dismissing the friend of his wife, as above stated, and soon after shot himself. This was, substantially, all the testimony tending to show insanity.

Messrs. Trowbridge & Dowling, for plaintiffs.

Messrs. C. I. Walker and A. B. Maynard, for defendant.

BROWN, J.—In considering whether there was sufficient evidence of insanity to be submitted to the jury, it was insisted at the outset of the argument that the act of suicide in itself was no evidence of mental aberration, and, indeed, it was conceded that, standing alone, it would not be sufficient proof to justify a verdict for the plaintiff. I find no case which goes further than this. In *Terry v. The Insurance Co.*, 1 Dill. 403, and *Coverston v. The Conn. Mutual Life Ins. Co.*, 3 Ins. L. J. 113, it is stated, "There is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity." In *Moore v. The Conn. Mut. Life Ins. Co.*, 3 Ins. L. J. 444,¹ Judge LONGYEAR says, "The fact of suicide is not, in itself, evidence of insanity."

¹ 1 Flippin, 863.

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In *McClure v. Mut. Life Ins. Co.*, 3 Ins. L. J. 221, it is said by the New York Court of Appeals, "Insanity cannot be presumed from the mere commission of this act." The question was fully and ably discussed and considered in *Coffee v. The Home Life Ins. Co.*, 35 N. Y. Superior Court, 314. The court upon the trial at *nisi prius* charged that, "The law cannot and does not presume that a party, in the full possession of his mental faculties in that normal condition of mind that we call sanity, will deliberately take his own life, and, therefore, as there is no presumption, it favors insanity at the time of the committing of the act of self-destruction. I therefore charge you as a matter of law, that as affecting this case, you must presume that the deceased, when he took his life, was not in a sound state of mind." This was held to be error, and Chief Justice BARBOUR, in delivering the opinion, says: "The most that can be said is that, inasmuch as many, and perhaps most persons who destroy their own lives, are insane at the time, the fact of such self-destruction itself wholly removes the presumption of sanity." SEDGWICK, J., in concurring, also announces that "a judge cannot determine whether an individual case of suicide is the result of insanity; that he cannot make a presumption upon the subject which is a generalization, more or less perfect, from individual cases." The same judge remarked in a subsequent case, in the same volume, *Weed v. The Mut. Benefit Life Ins. Co.*, 387. "The mere fact that a man kills himself does not create a presumption that he was insane. The general presumption is that every man is sane until the contrary facts are proved by the facts of the case. Suicide is but one fact which goes to the jury with all the other pertinent facts, for the purpose of getting from them a verdict as to whether the facts prove insanity."

This is the limit of authority upon the subject. It fol-

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lows, then, that neither an act of suicide, nor an attempt, nor a threat to commit suicide, standing alone, creates a presumption of insanity that would be sufficient to justify a jury in finding the party insane. None of the cases, however, go so far as to say that such an act cannot be considered in connection with the previous demeanor and conduct of the party, as evidence of insanity. Indeed, to say that suicide under no circumstances is evidence of insanity is to contradict the experience of every person who has dealt with the insane. One of the most frequent forms of mental disease is known as the suicidal mania. Dean's Medical Jurisprudence, 508. The author remarks in connection with this form of derangement: "Another feature it possesses in common with other forms of mental hallucination, is the occasional exacerbations that are continuous; when its symptoms for a time disappear the clouds of melancholy seeming to vanish, and all appearances indicating a return to health and its enjoyments. Again the propensity will reappear and generally, in the end, accomplish its purpose." I think no court could be found to hold that the repeated and causeless attempts to take one's life would not be proper to go to the jury as evidence of insanity. If repeated attempts are evidence, it is difficult to say why a single attempt or an act of suicide may not also be permitted to go to the jury, as there must be a first time. From motives of public policy rather than upon strict philosophical principles, the law has pronounced, and I have no doubt properly, a single act insufficient evidence of mental disease; but in connection with other circumstances it has always been deemed worthy of consideration. In the leading case of *Borradaile v. Hunter*, 5 M. & G. 639, ERSKINE, Judge, told the jury that they must take the act itself into consideration in connection with his previous conduct, and then say whether, at the time of its commission, they thought him capable of knowing

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right from wrong. So in *Brooks v. Barrett*, 7 Pick. 94; and in *Burrows v. Burrows*, 1 Hag. Eccl. 109, it is said the law does not consider the act of suicide as conclusive evidence of insanity; but in both these cases it was laid before the jury in connection with other circumstances. See, also, 1 Red. on Wills, 116; *Duffield v. Robson*, 2 Harrington, 375; *Chambers v. Queen's Proctor*, 2 Curt. 415. In all these cases it is inferentially, if not directly, decided that suicide is a legitimate item of testimony.

The rule of the criminal law is the same. From motives of public policy the law will not permit a person charged with larceny to say that the act itself proves him insane, while repeated and causeless acts of the same kind would be the strongest and only possible evidence of a species of mental disorder known as kleptomania. Dean's Med. Juris., 502. Instances are by no means rare of ladies whose birth and education would render them abhorrent of a criminal act, and whose circumstances would naturally remove them from temptation, being detected in frequent attempts to steal articles of trifling value, apparently from no motive except gratification of an abnormal passion. Such facts are undoubtedly proper to be laid before a jury, as evidence of kleptomania. A like rule would quite frequently obtain in cases of arson, homicide, and possibly other crimes. In determining, then, whether the evidence of insanity in this case was sufficient to justify a verdict for the plaintiff, I think the fact of the suicide and the threats, made upon the day of the death of the deceased, were proper to be considered by the jury in connection with his previous conduct.

It is insisted, however, that the insane acts, relied upon, were simply eccentricities of demeanor or, at most, temporary hallucinations, which lasted but a few minutes at a time, and ceased entirely some months before his death, leaving him perfectly sane and able to take care of his business. It

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is quite true there is no presumption of continuous insanity, temporary in its character, but I apprehend in most, if not all the cases, that support that doctrine, that the delusions were connected with some bodily disease, such as fever, pleurisy or *delirium tremens*, and necessarily ceased with returning health, or that they occurred so long previous to the commission of the act in question there could be no possible presumption of their repetition. *People v. Francis*, 34 Cal. 183; *Staples v. Harrington*, 58 Maine, 459, 460; *Field v. Hall*, 2 Abbot, U. S. 514; *Knickerbocker Life Ins. Co. v. Peters*, 42 Maryland, 414; *Carpenter v. Carpenter*, 8 Bush. 283; Green. Ev. 689.

It does not appear in this case that Wolff was affected with any disorder likely to be accompanied by insane manifestations. The delusions to which he was subject extended over a period of several months, and recurred without regularity, and apparently without cause. While nothing unusual was observed in his demeanor, for some months before the day of his death, his manner upon that day was such as to attract his brother's attention, and his conduct towards a visitor at his house such as to excite his wife's anger and induce her to leave his house. In this class of cases courts are very loth to take the question of insanity from the jury, and in the recent case of *The Charter Oak Life Ins. Co. v. Reuleb*, 10 Chi. L. N. 105, the Supreme Court of the United States said, if there was evidence of insanity the judge could not properly take the case from the jury. While I think there is nothing in this case indicating that the court intended to vary the rule announced in *Fant v. Pleasants*, 22 Wall. and that the court would still be justified in disregarding a scintilla of evidence and instructing a verdict for the defendant, I think very great caution should be exercised in withdrawing from their consideration questions of insanity upon which the opinions of men, equally wise, are likely to differ. While

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it is quite possible there may be a strong bias in this class of cases against insurance companies, this is an argument which should be addressed to the Legislature rather than the courts. I think there was no error in submitting the question of insanity to the jury in this case.

This case should be read in connection with *Lottis A. Moore v. Comm. M. L. Ins. Co.*, 1 Flippin, 363. [Reporter.]

EDWARD M. APPERSON ET AL. v. THE CITY OF
MEMPHIS, T. E. BROWN, F. C. SHAPER, TAX
COLLECTOR.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
MARCH 31, 1879.

1. POWER OF THE FEDERAL COURT—LOCAL LAW—MANDAMUS.—This court has power to so control its process as not to violate the local law, and to prevent injustice to the tax-payer.

2. STATE COURT—SAME.—The State court can make no order or decree which shall interfere directly or indirectly with a *mandamus* issued from this court. This court not only has the power to pass upon all questions connected incidentally with the collection of the tax, (in question) but it is its duty to exercise that power in such a way as that no property justly subject to its burden shall escape liability, and that those who have honestly paid their obligations shall, as far as possible, be protected.

3. CONSTRUCTION OF THE WORDS "MAY" AND "SHALL."—The word "may" is not to be construed in all cases as "shall." The ordinary meaning of the language used in legislative acts must be presumed to be intended, unless it would manifestly defeat the object of the provisions.

4. LAWS IMPOSING TAXES TO BE UNIFORM.—While laws imposing taxes are required to be uniform, it is no objection to a tax that there is a want of uniformity in its application.

5. SET-OFF—TAXES.—The general law is well settled that no set-off is admissible against demands for taxes, as they are not in the nature of

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contracts between party and party, but are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required. The fact that persons complaining were not parties to a suit out of which orders grew upon them to pay taxes, affords no ground to set such orders aside as to them.

6. *MANDAMUS*—ITS NATURE.—It would seem that where the judgment on which a *mandamus* is founded has been reversed, the *mandamus* would fall also.

Demurrer to bill, which prayed for an injunction against the collection of a tax.

STATEMENT OF BILL.

Complainants are citizens of Shelby county, Tennessee, and property owners and tax-payers of the city of Memphis. Defendant Brown is a citizen of Iowa, and Rawlings and Shaper are tax collectors of the city of Memphis. By an act of the Legislature passed November 24, 1866, the city of Memphis was empowered to lay Nicolson and stone pavement, etc., and to charge the entire cost of such improvements on the abutting property. By virtue of this act and in pursuance thereof, the city, by ordinance, provided for paving certain streets with Nicolson pavement and certain alleys with stone. Contracts were made by the city with certain firms to lay such pavements, and part of the work was done, when defendant Brown became the assignee of such contracts, and completed the work. In pursuance of the system adopted, bills were made out as the work progressed, against the owners of property abutting upon said improvements for the entire cost of the pavement to the center of the street in front of such lots, and payment thereof demanded of the owners. Under threats of suit complainants severally paid to Brown the entire cost of making said improvement in front of their several pieces of property, for which payment Brown gave receipts in full, as against them, for their part of such improvements. Most of the citizens whose property was on these paved streets, resisted this mode

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of collection and assessment, and refused to pay. Numerous bills were filed against such by Brown, which were resisted in the courts, and in 1872 the Supreme Court of Tennessee declared that the act of the Legislature of November 24, 1866, pretending to authorize the city to make the assessment by frontage to pay the cost of the pavement, was unconstitutional and void. After this decision, Brown, by a suit in this court against the city of Memphis, on the thirteenth of March, 1872, recovered judgment against the city for \$488,993 for said work, from which judgment the city took an appeal to the Supreme Court of the United States, but being unable to give a supersedeas bond, the judgment stood in force pending the appeal. Upon the hearing of the appeal in the Supreme Court, the decree of this court was reversed in part and the cause remanded to this court, in which, on the fifteenth of March, 1875, a new decree was rendered in the sum of \$292,133.47. By an act of the Legislature passed on the 18th day of March, 1873, it was enacted that "where an incorporated town or city has, by virtue of presumed authority to levy special assessments for specific purposes, levied and collected taxes or special assessments, the right to make which special assessment was afterward declared void by the Supreme Court of the State, said town or city shall have power to levy a tax, in addition to all other taxes allowed by law to be levied, sufficient to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made. And in the levying of such additional tax authority is hereby given to such town or city to allow as valid payments on such additional tax any sum or sums, with interest, paid by persons in satisfaction, or in part satisfaction, of said special assessments illegally levied and collected as aforesaid." After the passage of this act, on the 24th of June, 1873, a writ of *mandamus* was granted against the city, commanding it to levy a tax to

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pay Brown's then existing judgment of \$488,993, the city having taken an appeal without a supersedeas. This was the first mandamus, and was predicated upon the aforesaid act of 1873. In pursuance of this act, the general council of the city of Memphis passed an ordinance to provide for the issuance of certificates of indebtedness to all persons who had paid assessments, which certificates provided upon their face that they should be receivable in payment of any tax levied to cover the entire cost of the Nicolson pavement. In pursuance of this mandamus of June 24, 1873, the city of Memphis levied a tax of seventy cents on each one hundred dollars worth of taxable property to pay Brown's said judgment. For 1874, without mandamus, the city levied a tax of thirty cents, for the same judgment, voluntarily, upon all the taxable property of the city, including the property of these complainants, and sought to collect the same in money. On the 22d of March, 1875, the act of March 18, 1873, was repealed, and upon the same day Brown filed in this court a petition for an alternative mandamus against the city, claiming a balance of \$292,133.47, found to be due him by the decree of March 15, 1875, and praying that the city be required to levy a tax each year, for '75, '76 and '77, sufficient, after allowing for errors, delinquencies, insolvencies and defaults, to realize \$125,000 each year. The answer of the city was filed, and on the 28th of June, 1875, a peremptory mandamus was issued. On the 9th of February, 1876, the city filed a return to the peremptory writ, presenting sundry excuses for not promptly obeying such writ, and submitting certain legal questions to the court for its decision, for its own guidance in levying a tax. Among other questions were the following: First. Whether those lots upon which the frontage tax had been paid were exempt? Second. Whether the ninth and tenth wards, which had been taken into the city after the contracts with Brown's assignors, were

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exempt? Third. Whether the capital of merchants should be included in the levy as subject to such tax? On March 2, 1876, upon due consideration of the matter set forth in said return of February 9, and the affidavit of Brown filed upon March 1st, the court adjudged the ninth and tenth wards and the property upon which the assessments had been paid, exempt, but held the merchants capital liable, and ordered an *alias* writ, commanding a levy of an additional tax, sufficient, excluding the exempted property, to pay the residue of Brown's judgment. From these orders appeals were taken to the Supreme Court of the United States, where such orders were afterward affirmed and are still in force. The bill of complainants now filed, sets forth that they are the owners of lots in front of which pavements were laid and the cost thereof paid to Brown and for such sums, thus collected, Brown gave receipts in full satisfaction of the cost of the pavement in front of the lots designated. It claims that, independently of the judgment of March 2, 1876, in the mandamus proceedings, Brown is estopped from demanding additional tax on said property. The frontage tax was necessarily larger than the *pro rata* share of the particular property would be in a general tax, because, by the frontage tax, the whole cost of the pavement was imposed on a small portion of the property in the city, while a general tax would cover the whole; hence, in any contingency, those who paid the frontage tax have paid more than their just share of the entire cost of the pavement. The bill further claims that the act of March 24, 1873, was the only authority granted by the Legislature to the city to levy a tax for the payment of the cost of the pavement, and that under this act the power granted was to levy a tax sufficient to cover the entire cost of the pavement, with interest thereon, and coupled with this power, was also the authority and duty to allow, as valid payments on such additional tax, any sums, with interest,

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paid by persons in satisfaction of such special assessments illegally levied and collected. To the mandamus proceedings none of these complainants were parties, and hence are not estopped by the judgment to deny the liability of their property. It is charged that in pursuance of the act of 1873, the city took steps, by ordinance, to issue certificates, and to protect those who had paid frontage tax from further taxation; but in spite of this the collectors are claiming to collect again this tax from the complainants, and they are instigated thereto by the demands and threats of Brown. For 1876, the city, in conformity to the judgment of this court of March 2, considered the ninth and tenth wards, and the property which had paid the frontage tax assessment, as exempt; but as it was impracticable in making the tax books, to exclude this property, which was taxable for other purposes, the mandamus tax was put upon all the property without distinction, but the rate was fixed so high, that the amount to be realized in money would cover the amount demanded by the mandamus, after allowing those who had paid the frontage assessment to pay the tax on that particular property in Brown's receipts or paying certificates. Still the tax collectors are pressing the collection in money against the exempted property. The bill further sets forth that the city is insolvent; that the tax collectors, if not insolvent, have property of little value, and wholly inadequate to answer complainants' demands. That, by the laws of Tennessee, taxes are a lien upon property, and constitute a cloud upon complainants' lots, and unless restrained, such officer will proceed to sell the property for payment of taxes; that the attempt to collect such taxes, and especially the actings and doings of Brown, are a fraud upon the complainants and upon the court; that some of the complainants hold the receipts of Brown for the payment of the front foot assessments, and some of the scrip of the city, issued in exchange for his

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receipts. Complainants have tendered and offered to surrender a sufficient amount of such receipts and scrip to cover their respective taxes, and desire to enjoin the collection of all such taxes in money. Complainants pray that the city and its officers be enjoined from collecting from said complainants any part of the mandamus taxes on their property, described in the exhibits to the bill, and that the right of complainants to satisfy and discharge the mandamus tax, levied or to be levied, on any of their lands in the city, by the payment of said receipts or scrip to the amount of the money originally paid by each of them on frontage assessments, be declared and established. To this bill Brown interposes a demurrer for want of equity upon the ground: First. That the front foot assessments paid by the complainants were voluntary payments, and the only remedy the complainants have for a recovery of the amount so paid is against the city. Second. That the act of March 18, 1873, under which the complainants claim the right to pay in Brown's receipts or scrip issued in exchange therefor, was repealed before the taxes complainants are seeking to enjoin were levied or ordered by the court to be levied. Third. That the decree of the State Court in favor of Bethel and others, enjoining the collection of the taxes levied under the mandate of this court, was void for want of jurisdiction in the State Court to pronounce the same, and cannot be relied upon as a ground of relief here. Fourth. That the Constitution of Tennessee requires that all property shall be taxed, and that taxation shall be equal and uniform, and the fact that the tax is required to be levied, requires that it be levied upon and collected from the property of the complainants as well as others. Fifth. That the judgment of March, 1875, decided that all the questions made by the appeal adversely to the complainants, and this court cannot now make a decree inconsistent therewith. Sixth. That the taxes complainants

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here seek to be relieved from were not levied under the order of March 2, 1876, but under the judgment of March 30, 1875, and no right to relief from such taxes can be based on the order of March 26, 1876. Seventh. That the complainants have by law no right to set off claims due them by the city, against the taxes levied by the city under the mandate of this court. Eighth. If the complainants have any equity at all, such equity extends no further than to the particular piece of property owned by any complainant, on which the assessment by the front foot was in fact paid, and such equity is in no sense personal or restrictive of the personal obligation of the person who made the payment, and the bill does not show whether or not all the property on which the taxes sought to be enjoined have been levied is property on which the frontage assessments have been paid. Next, the bill shows that some of the property on which the taxes are sought to be enjoined was never assessed for the cost of the pavement.

Meriwether and Myers & Sneed, for complainants.

Wm. M. Randolph, for the defendant, Brown.

BROWN, J.—No doubt is entertained of the power of this court to control the execution of its process in such a manner that no local law be violated and no injustice be done to any particular tax-payer. Clearly no power exists in a State Court to make any order or decree which shall interfere directly or indirectly with this mandamus, and unless the power is vested with us the tax-payer will be remediless. This was the view taken by the Supreme Court of Tennessee in *Lea v. The City of Memphis*; by the Supreme Court of the United States, in *The City of Memphis v. Brown*, No. 599,¹ October term, 1877; and also by Judge EMMONS, in *Brooks v. The City of Memphis*, 3 Central Law Journal, 356,

¹ Reported in 1 Flippin, 166.

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where the question of the taxability of merchants' capital for these assessments was fully considered. Not only has this court the power to pass upon all questions connected incidentally with the collection of this tax, but it is our duty to exercise that power in such a way that no property justly subject to its burden shall escape that liability, and that those who have honestly paid their obligations shall, as far as possible, be protected. Acting upon this theory, the order of March 2, 1876, was made, exempting the property upon which the assessment had been paid, and no reason is now perceived why that order should not apply to all writs of mandamus issued from this court for the collection of this tax, whether such writs were issued before or since the making of such. The payment of these assessments having been voluntary, perhaps it would be difficult to justify this order upon technical principles of law without trenching upon another maxim—that all taxation must be uniform. But without touching upon this question, the order was upheld by the Supreme Court upon the ground that it was exactly the order which Brown had asked for, and that he could not be heard to complain of it. The case certainly presented the strongest possible equities for the exemption of the property in question. But we are now asked to go further (and that is the main question in the case) and exempt not only the property upon which the front foot tax was paid, but all other property of the owner to the amount of Brown's receipts or the city scrip still in his hands, so far as there is a balance still remaining unapplied to the payment of the frontage assessment upon his paved lot. It is argued that the only authority to impose this tax is derived from the act of March 18, 1873, and that by this act, the city was required to allow as valid payments, any sums so paid in satisfaction of special assessments. It will be observed that this act did not in terms exempt such property from assessments, for that might

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have laid the tax open to the charge of want of uniformity. But it sought to bring about the same result by permitting Brown's receipts to be taken in payment. The act evidently contemplated that a tax should be laid sufficient to cover the *entire* cost of the improvement, including the amounts already paid by way of special assessments; in which case, the allowance of these amounts, so paid, would still leave enough to pay Brown the balance due him. Indeed, the certificates of indebtedness issued under the provisions of the ordinance of June 29, 1873, passed in accordance with the above act, provided upon their face that they should be receivable only in payment of any tax that might be levied by the city of Memphis to cover the entire cost of laying the said pavements. This course, however, was not pursued. A tax was laid sufficient simply to pay Brown the residue of his claim. Of course, he was entitled to payment in cash, and, if his receipts or city scrip were taken in liquidation of the amounts, he would realize little or nothing upon his rights. It is true, that where the course contemplated by the act was pursued, permission was given to allow the special assessments as payments, but I do not understand that the Legislature absolutely required this to be done, or that the general council intended it to be done, unless a tax was laid sufficient to cover the *entire* cost of the improvement. It is not true that in all cases the word "may" must be construed as "shall." The principle adduced from the modern cases is that that exposition ought to be adopted in this case as in other cases, which carries into effect the true intent and object of the Legislature in the enactment; the ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Sedgwick on Statutory Law, p. 439; *Minor v. Mechanics' Bank of Alexandria*, 1 Peters, 46, 64; *Mason v. Fearson*, 9 Howard, 248, 250. In this case, if the course

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marked out by the statute had been pursued, and a tax had been laid to cover the entire cost of the improvement, I should have found little difficulty in holding that the city was bound to credit the special assessments; but, where such construction would defeat the object of the writ, a different rule should be applied. This seems to have been the view adopted by Judge Trego, in his opinion of August 23, 1877, enjoining the defendants Rawlings and Shaper from collecting anything but money in payment of this tax. While laws imposing taxation are required to be uniform, it is no objection to a tax that there is a want of uniformity in its *application*. For instance, a tax of twenty-five dollars is imposed upon all retail dealers in liquors. The tax is uniform, but it bears ten times heavier upon one who only does a business of a thousand dollars a year, than upon one whose sales amount to ten thousand dollars. "It is only where statutes are passed which impose taxation on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any sense proportionate in their effect on those who are to bear the public charges." Cooley on Taxation, 127. In the imposition of taxes upon real estate great inequalities frequently occur in the assessment and valuation, beyond the reach of the Legislature or courts. If the collection of these mandamus taxes could be so arranged that every tax-payer holding Brown's receipts or city scrip, could use them in payment, all would receive a like benefit; but, as has already been shown, this is now impracticable, owing to the fact that the tax was laid only sufficient to cover the balance due him upon his contracts. But to permit one to avail himself of this privilege, and to deny it to another, is to produce inequality rather than uniformity. To illustrate: A owns two lots; in front of one the pavement was laid and the assessment paid. In paying this assessment A paid one thousand dollars more than he would

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have paid on this lot had a general tax been laid over the whole city; he now asks that the tax now laid upon his second lot may be paid with city scrip to the amount of the thousand dollars overpaid upon the first. Upon the other hand, B owns but one lot, upon which he has paid an assessment greater by one thousand dollars than he would have paid if a general tax had been laid, but having no other property, he can only look for his thousand dollars overpaid, to the responsibility of the city. The general tax-payers, then, are called upon to make up the thousand dollars held by A in scrip, and not that held by B, simply because A happens to own another lot. I think the liability of the general tax-payers should not depend upon an accident of this kind, but that all parties holding city scrip of this issue should be placed on an equality and required to look to the city for payment. Leaving out of view the act of 1873, there seems to me no reason for holding that complainants are entitled to set off assessments illegally but voluntarily paid. The general law is well settled that no set-off is admissible against demands for taxes, as they are not in the nature of contracts between party and party, and are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required. *M'Cracken v. Elden*, 34 Penn. State, 239; *Pierce v. Boston*, 3 Metcalf, 520; Cooley on Taxation, p. 13, 14. In *Fremont v. The County of Mariposa and Early, sheriff*, 11 Cal. 361, it was held directly that equity will not relieve from a tax on the ground that an illegal tax was collected of the complainant in former years. The fact that complainants were not parties to the original suit or to the proceedings which culminated in the orders of March, 1875 and 1876, does not confer upon them the right to object to these orders or set them at naught. *State Railroad Tax Cases*, 92 U. S., 575, 609. I see no authority for

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collecting taxes levied for 1873-4. The judgment upon which the mandamus for their collection was based was afterwards reversed by the Supreme Court of the United States, and a new judgment taken in 1875 for the balance remaining due to Brown. The mandamus was in the nature of an execution and when the judgment was reversed and held for naught, it would seem the mandamus must fall with it. But as this point was not made by defendant Brown in his brief, I am quite willing to reconsider it if I have overlooked any material fact in this connection. I think the complainants are entitled to an injunction against the collection of the tax for 1873 and 1874, and also against the collection of any tax for this pavement upon property in front of which the pavement was laid and the assessment paid, but as to all other property the demurrer is held good. Counsel will prepare the proper order and submit it to me for signature.

The decision of Judge EMMONS (referred to) in *Brooks v. The City of Memphis*, laid down several important propositions, among others these:

"When a contract has been made with a municipal corporation, and the work performed by the contractors, who relied upon a certain mode of taxation, which the Supreme Court declared unconstitutional, and the Legislature afterwards pass a law to take the place of the invalid law, under which a judgment is had and a mandamus applied for, when this latter law is repealed; the court will disregard the repeal and apply the same rule as though it was in full force when the contract was made.

"The Legislature has no power to repeal the only adequate remedy to enforce an existing judgment, unless some other reasonable mode of enforcement is provided. And this is so by virtue of the provision in the State constitution, which declares that 'no retrospective law, or law impairing the obligation of contracts should be passed.' And although there may be a statutory limitation upon a corporation's general power of taxation, yet, where there has been an express grant of power to such corporation to contract a debt, a power of taxation for its payment will be implied.

"The Federal courts will sometimes delay judgment to await decisions in State courts, but where there is a mandamus to enforce the payment of a final judgment in a case where a tax to be collected had been levied according to the common usage of the State, and no objections have been raised to the lawfulness of the tax in other cases, or as to the taxes levied for other purpose—such a course will not be followed." [Reporter.

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CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—MARCH
31, 1879.

1. REMOVAL OF CAUSES—INDISPENSABLE PARTIES—SEPARABLE CONTROVERSY—ACT MARCH 3, 1875, 18 ST. 470—REV. ST., § 639—CLOUD ON TITLE—TRUST DEED TO SECURE DEBT—PRACTICE AS TO PARTIES.—The Federal Courts have no jurisdiction, by removal from a State Court of a bill, to remove a cloud from the title of the plaintiff, where the trustee in a deed of trust to secure a debt and the creditor secured have been made parties defendant, they being citizens of another State, and the defendant in possession whose title is attacked and who executed the deed of trust, being a citizen of the same State as the plaintiff. There is in that case no such separable controversy between the plaintiff and the non-resident defendants as can be wholly determined between them, whether the jurisdiction by removal be claimed under the act of March 3, 1875, 18 St. 470, or that of 1866, Rev. Stat. § 639.

2. SAME—EJECTMENT IN A COURT OF EQUITY—BILL TO REMOVE CLOUD—JURISDICTION.—It is one of the peculiarities of the equitable jurisprudence of Tennessee, that a claimant of land out of possession may file a bill in equity to remove the deeds of an adverse claimant in possession as clouds on his title; but whether a Federal Court of equity could maintain such a bill may be doubtful. The question is not raised in this case. It might result only in a repleader on the law side of the court as an action of ejectment, and not defeat the jurisdiction entirely.

Metcalf & Walker, for the motion.

T. B. Edgington, contra.

Motion to remand.

HAMMOND, J.—This bill was filed in the Chancery Court of Tipton County by the plaintiff, who is a citizen of Tennessee, against York and others, who are citizens of the same State, against Schaller and Gerke, who are citizens of Ohio,

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and Hahn, who is a citizen of Kentucky. It is brought here on the petition of these non-resident defendants alleging a difference of citizenship and a controversy wholly between them and the plaintiff; and the plaintiff moves to remand for want of jurisdiction. It is not sought to be removed on account of the subject matter in controversy. It appears from the bill that the plaintiff held title to the land in controversy by a title bond from one Trigg, who is dead. Although the purchase money was all paid no deed has ever been made. On the 13th day of November, 1867, defendants Schaller and Gerke recovered in this court a judgment against the plaintiff here upon which an execution issued that was levied on the land in controversy. The plaintiff filed his petition in bankruptcy in this district on the 23d day of November, 1867, and an assignment of his property was duly made to the assignee. The marshal sold the land under the execution, and on the 27th of January, 1868, executed to the purchasers, who were Schaller & Gerke, the execution plaintiffs, his deed therefor. They obtained possession, it is alleged, by collusion with the tenant, and on the 31st of January, 1871, conveyed the land by deed to one Bass, who executed certain notes for the purchase money, and secured them by a deed of trust with power of sale to defendant Hahn as trustee. Bass sold to defendants York and Noblin on the 1st of January, 1873, and they are in possession claiming to be the owners of the land. They became involved in litigation in Shelby County with the executor and heirs of Trigg, and the proceedings are set out in this bill to show that by them York and Noblin have prevailed in the litigation and sustained their title as against the Triggs. It is not material to take further notice of these allegations as they do not affect the question here. The controversy with the Triggs is wholly independent of any controversy involved in this motion, and cannot influence the judgment on it.

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The assignee in bankruptcy, on the 9th day of January, 1874, sold the land as the property of the plaintiff, at public sale, the plaintiff himself becoming the purchaser and receiving the assignee's deed. It is this title through the assignee which he seeks to maintain by this bill. He alleges that the title of the defendants through the execution sale is void for various reasons assigned and properly averred in the bill, the most important of which are that, the title levied on was not a *legal* title, because he only held it by title bond that gave him only an equitable estate not subject to sale by execution at law, and that certain formalities as to notice were not pursued by the marshal, whereby no title passed with his deed. It does not appear whether the Bass notes, given to Schaller & Gerke and secured by the deed of trust to Hahn, have ever been paid; but the bill asks for information on that subject, and demands proof that they remain unpaid.

The prayer of the bill is that the execution sale and all the subsequent conveyances grounded on it be set aside and removed as clouds from the plaintiff's title, and for general relief.

It is the settled law of Tennessee that, an adverse claimant out of possession, although he may bring ejectment for the land, may also go into equity and file a bill to remove the deeds which stand in his way as clouds on his title; and the court having jurisdiction for that purpose will, having canceled the deeds, put the plaintiff in possession. *Johnson v. Cooper*, 2 Yerg. 524; *Jones v. Perry*, 10 Id. 59; *Almory v. Hicks*, 3 Head. 39; *Anderson v. Talbot*, 1 Heisk. 407, which was the case of a sheriff's deed; *Williams v. Talliaferro*, 1 Coldw. 39; *Porter v. Jones*, 6 Id. 318.

It is said by Chancellor COOPER, in his note to *Hickman v. Cooke*, 3 Humph. 640, which seems to be somewhat contrary to the other cases, that this doctrine in Tennessee is

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the result of judicial legislation, and whether the equity courts of the United States will follow it or not it is not now material to determine. On removal of such a case it might become on repleader a pure action of ejectment on the law side of the court, and the jurisdiction not be entirely defeated. The only question is who are the necessary and indispensable parties to such a bill? I have searched the cases to find out if this has been determined and do not find any case on that subject except *Mullinix v. Perkins*, 2 Coldw. 87, where it is said, "if the mortgage is in fee and the mortgagee is dead, the heirs-at-law of the mortgagee or other party, *in whom the legal title is*, must be made a party." This would indicate that Hahn, the trustee, is a necessary party, because the holder of the legal title. It also decides that the *administrator* of the mortgagee is not a necessary party. This would seem to indicate that the holder of the debt secured is not indispensable, and the mortgagee himself would be necessary, not because of his debt, but because of his title, for the same case holds that his heirs-at-law must be parties. I have no doubt whatever that the holder of the legal title is an indispensable party always, whether he be a mortgagee holding the fee, or a trustee holding it in part. And the argument in favor of our jurisdiction here is, that such holder of the legal title is the only indispensable party, and that the case stands as if an ejectment at law had made the tenant in possession a party, and the landlord had come in and become substituted as the real party in interest, the tenant being only nominally and not beneficially interested. I think this would be so if York and Noblin were only tenants in that sense, that is lessees from the owner for a term of years. But they are not such tenants. They are indeed the owners of the land subject to the incumbrance upon it in favor of Schaller & Gerke for the Bass notes. That incumbrance out of the way and they have the whole fee legal and beneficial.

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Upon payment of the Bass notes the title would be complete in them without any conveyance from the trustee. *Carter v. Taylor*, 3 Head. 30; *Williams v. Niel*, 4 Heisk. 279, 283.

It seems to me that in a court of equity such ownership renders the owners indispensable parties to any bill which seeks to cancel their deeds and compel them to surrender the possession. Hahn, the trustee, is only necessary because he holds the legal title. It is true in one sense he is trustee for both debtor and the creditor in such an assignment for the benefit of a creditor; but he is only a naked trustee as to him, unless a surplus is realized, and I think in no proper sense does he represent the grantor so as to dispense with him as a party defendant to a bill involving the title. If sued alone, the trustee would properly plead that the grantor should be joined with him. He would represent sufficiently the creditors who are the beneficiaries of his trust. *Kerrierson v. Stewart*, 93 U. S. 155. But I do not think this principle would apply to him in his capacity as a representative of the grantor.

The controversy is not wholly between Steinkuhl, the plaintiff, and Schaller & Gerke, because they are only the holders of notes secured by the deed of trust on the land. They have no other interest in it, and but for that would be wholly unnecessary parties, because by their deed to Bass they parted with their title. Hahn, the trustee, is not a necessary party because he represents the holders of the notes, as we have already deduced from the case of *Mullinix v. Perkins*, *supra*, but because he holds the legal title. The controversy of the plaintiff with Schaller & Gerke and Hahn (as their representative,) is only incidental. The accident of Schaller & Gerke having been one of the mesne conveyancers and the purchasers at the execution sale, does not alter it. It is not because they were such purchasers they are made parties, but because of their deed of trust. Bass is

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not made a party and need not be, I think; neither would Schaller & Gerke have been necessary if their grantee had not secured them by a deed of trust on the land. Their interest in the controversy depends wholly on the fact that these notes may be yet unpaid. There is then in this bill as between the plaintiff, and Schaller & Gerke, and Hahn, or either of them, no controversy which is *wholly* between them and which can be fully determined as between them, such as is required to give this court jurisdiction. Act March 3, 1875, 18 St. 470.

I do not see that the jurisdiction can be any better maintained under the act of 1866, R. S., § 639, if we concede it has not been repealed by the act of 1875. The case of *Fields v. Lounsedale*, 1 Deady, 288, held that a suit to quiet title against tenants in common might be removed as to one of them. And in *McGuinely v. White*, 3 Dill. 350, it was held that one copartner might under certain circumstances remove the case as to himself; and there are other cases of similar import. But I think this can be done only where the cause of action is joint and several, or may be severed as between the defendants without further inconvenience than that of having two or more suits. Tenants in common have no estates dependant upon each other; not so with a creditor holding a deed of trust to secure his debt. His estate in the land is part and parcel of that of the owner of it who has executed the deed. It is only an *incumbrance*, and it is obvious that a bill in equity, which would leave out the owner and be filed alone against the incumbrance or where the controversy did not concern the debt, but was wholly about the land, would be fatally defective. If on such a bill between Steinkuhl and Schaller and Gerke, and Hahn, the trustee, this court should hold the title of the plaintiff here better, and that of the others void; and on same facts the State Court should hold York & Noblin's title better than that of

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the plaintiff derived through the assignee in bankruptcy, I doubt if Schaller & Gerke would be precluded by the decree here from foreclosing their deed of trust. They could say, having had your title sustained by a court of competent jurisdiction our deed of trust is fastened upon it as a lien. The lien holder cannot be separated from the general owner in a controversy *about the title*; they must both stand or fall together. *Gardner v. Brown*, 21 Wall. 36; *Cape Girardeau & S. L. R. R. Co. v. Winston*, 4 Cent. L. J. 127. York and Noblin are necessary parties to any relief which is asked against Schaller & Gerke, or Hahn their trustee, just as well under the act of 1866 as that of 1875. Indeed, both acts, so far as they relate to this question, are substantially the same.

The cause will be remanded to the Chancery Court of Tipton County.

Motion granted.

NOTE.—No question was made or determined as to this being a case "arising under the Constitution and laws of the United States," of which the court might acquire jurisdiction under the act of 1875. The petition for removal did not present that ground. See *Wooldridge v. McKenna*, 8 Fed. Rep. 650.

THE ILLINOIS, WHITE AND CHEEK.

DISTRICT COURT—WESTERN DISTRICT OF TENNESSEE—APRIL
3, 1879.

LIENS FOR SUPPLIES UNDER THE STATE STATUTE.

1. **LIENS FOR NECESSARIES.**—Contracts for necessities furnished at the home port, are a lien for ninety days, under the Tennessee Code, Section 1991, and it is not essential, under the statute, that credit should be given to the ship. The lien attaches to all contracts for the supplies, without reference to the fact whether the credit was given to the vessel or the owner.

2. **REMEDY TO ENFORCE LIEN.**—The remedy for the enforcement of the lien given by sections 3550 and 3562 of the Tennessee Code, whether valid or invalid, does not defeat the lien or the jurisdiction of the Admiralty Court to enforce it.

3. **WAIVER OF LIEN.**—The taking of notes for the debts do not waive these liens. Nor does the taking of the deed of trust to one of libellants waive them.

4. **CONDITIONAL ACCEPTANCE OF DEED OF TRUST.**—The acceptance of a trust, conditional on its acceptance by other creditors, which they fail to do, excuses the trustee, and he will not be held to have forfeited his lien. *Contra*, BAXTER, J., (on appeal.)

5. **C. O. D. CLAIMS NO LIENS.**—Bills of lading, "C. O. D.," are not a lien on the boat to secure payment of the money collected from the consignee on delivery of the goods, and will be disallowed.

6. **BAR LEASES NO LIENS.**—The bar leases, or contracts for rent of the bar privileges, are not secured against breach by a lien on the boats, and where the boats were seized before the time expired, the allowance for the money paid in advance will not be preferred over other general creditors.

7. **INSURANCE PREMIUMS—LIENS.**—Premiums of insurance are a lien and will be so allowed.

8. **MORTGAGE—ITS RANK.**—A mortgage will be paid after lien claims and before general creditors.

9. **PRIORITY OF LIENS.**—Supply liens, under the statute, belong to same class as maritime liens for supplies, and will share with them and be paid in preference to the mortgage. Insurance premiums on policies issued prior to the mortgage will be preferred to it, but those on policies issued since the mortgage will be postponed till it is satisfied.

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10. REPUDIATING TRUST DEED.—The packet company cannot repudiate their deed of trust, and general creditors may claim its benefits by petition against the remnants.

The facts were: The Memphis and Vicksburg Packet Company was duly incorporated under the laws of Tennessee, having its home office at Memphis.

Three steamers belonged to it: the Illinois, the G. W. Cheek, and the A. J. White. They were duly enrolled in the custom-house in that city. The plan was, (afterwards carried out) to run these vessels from Memphis to Vicksburg, making regular trips, also, to Helena and Napoleon, Ark., and stopping, as occasion required, at the different landings. The proof showed that the company had a large credit and had used it in the purchase of supplies, making repairs, etc., without any serious question on the part of creditors until the fall and winter of 1876–1877. The vessels were supposed to be worth between \$50,000 and \$60,000, at that time. Becoming somewhat pressed for money, certain creditors, especially one N. M. Jones, offered to aid the company; and advised the drawing up of a deed of trust, in his favor as trustee—being, as he then declared, of the opinion that he could so manage the vessels as to pay off the debts. Accordingly, on the 16th day of November, 1876, such a deed was made to him, as trustee, for the purpose of securing all creditors. He accepted the trust, and began the running of the boats, and so continued for about one month. The deed was registered in the office for registration of deeds in Shelby county and, also, in the custom-house. This not only embraced the boats, but other property not belonging to the steamers, such as office furniture, books and accounts due to the company, an iron safe, etc., etc. For years prior to the making of this deed money was borrowed, repairs made and supplies purchased under the direction of George W. Cheek, who was one of the principal owners of the boats

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and superintendent of affairs. The owners lived in Memphis, where the general business was transacted. Prior to the deed of trust to Jones, the M. & V. P. Co. had made a mortgage on the Illinois to secure J. C. Neeley and Louis Hanauer, who, at Cheek's request, had indorsed the company's note for \$5,000, which they eventually had to pay.

The facts seemed to point to Jones, trustee, etc., as the party who instigated the filing of the libels. The mate, the engineer of, and a seaman on, the G. W. Cheek, caused that vessel to be seized by process prayed for and duly issued on the 13th day of December, 1876. A tug belonging to Brown and Jones brought the marshal alongside of this vessel, where the attachment was executed. Turner, one of the libellants just named, was paid off by Jones, trustee, within three hours after his libel was filed. He swore that Captain Darragh, one of the captains under Jones, requested him to swear it out and promised that he would be paid the amount of his claims, if he would do so. The deed provided that G. W. Cheek should be paid \$50 per week for his services, and if Jones did not pay off the debts by the 1st day of August, 1877, on the request of any creditor, it became his duty to sell off one or all the boats. Another provision in the deed was, that Jones, "as said trustee, was to take charge of, manage and run said steamboats in the trades in which they are respectively engaged, so long as paying rates can be obtained, and the business in his judgment be made profitable, with full power and control of the same, and authority to repair, insure, and do other things necessary to preserve the value and efficiency of said boats, and also to employ officers, agents," etc.

On December 13, 1876, Karr filed his libel in the District Court against the A. J. White, following those of the engineer, mate and seaman. Monaghan filed a libel against the G. W. Cheek, on the 21st day of December, 1876; Karr,

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against the Illinois, on the 13th day of December, 1876, and at same time and within a few days thereafter the other libels (intervening) were filed. Jones, (the trustee,) as surviving partner of Brown & Jones, filed his several libels against each of the vessels, on the 20th day of December, 1876, claiming, as did other libellants, the right to proceed against the vessels under the maritime and State laws to enforce liens for supplies and materials furnished, and setting forth particularly his separate claims, such as occurred within three months prior to the filing of the same, under the provisions of the State law.

There was no allegation in the libels that the company, at the time of furnishing supplies, was in such an unsatisfactory condition, financially, as that no prudent man would give it credit, nor that the boats required credit. Some of them did allege that credit was given to said boats by saying that the items were charged to them. There was no allegation in any of the cases of a special contract made with the master or owners of the boats that supplies were to be charged to them, by reason of the fact the furnisher or furnishers of such supplies were unwilling to give credit to the company. Nor did any of the libels allege that there was a necessity for credit to be given to the boats. One of the libellants alleged that Cheek said he should charge, in one particular case, the bill to one of the boats, naming it; while to another he said he should so charge the supplies furnished in that case, because C. wanted to keep the accounts of each boat separate. The company had abundant credit. In fact, there was no evidence introduced to show that it had been refused that at any time. Karr, one of the original libellants, in giving his testimony, stated that he always charged supplies to the boat.

In answer to the question, whether, when the parties purchasing lived in Memphis and were responsible, he was in

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the habit of looking to the owners of the boat for pay, he said he had never, in any instance, given credit to the owner instead of the boat. He, as all other libellants, seemed to go upon the idea in all cases that, whether the owners were responsible or not, all they had to do was to charge the goods to the boats; and all the articles furnished were so charged in each case, according to the books and accounts which were brought forward, without any reference whatever to the solvency or insolvency of the owners.

The lien of the State was declared on in Karr's and other libels, as follows, (the same form as adopted by many others.) "Libellants further allege and propound that, by the statute laws of the State of Tennessee, they have a positive, express and declared lien on the said steamer, for all supplies, materials, articles, repairs that appear from the said accounts—herewith filed—to have been furnished said steamboat within the period of ninety days of filing of these libels, which they hereby specifically state and charge," etc.

Two of Karr's amended libels were filed March 14, 1877; another February 26, 1877. The only charges of insolvency were made in his amended libels. They did not allege that as an existing fact at the time credit was given, nor was there any proof in the record to that effect.

Jones, the trustee, on the 21st day of December, 1876, presented his petition in the District Court, praying for an immediate sale of said vessels already libelled, in which, among other things, he stated that he was "willing to yield up his trust, so far as he is concerned, if necessary to the purposes of this court, but not to affect or prejudice the rights or claims of any of the creditors herein, and he reserves his title to said property, if necessary, under said trust, to sustain the same, and claims possession." He alleged that it was necessary to the interests of all parties that the boats should at once be sold, as the business season

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was passing away rapidly. To this petition he filed, as an exhibit, the following paper, (addressed to the district judge):

"Your petitioners, the undersigned creditors of the steamboats A. J. White, Geo. W. Cheek, and Illinois, have carefully read and examined the petition of N. M. Jones, trustee, under the assignment of the Vicksburg & Memphis Packet Co., heretofore made. We do hereby earnestly advise that the said steamboats be immediately sold upon such terms and in such manner as the honorable court may decree correct and proper. The amounts opposite our names indicate and show the total sums of money due us from said steamboats. We are urged to invoke the immediate action of the court in this particular, on account of the rapidly increasing charges and costs of keeping said boats. Experience shows that the longer such property is allowed to remain unused and idle the more the value of the same depreciates." Reference was then made to the shortness of the business season, and in conclusion, they asked "that an immediate sale be made."

This paper was signed by Karr and several other persons and firms who had filed libels. The amount placed opposite Karr's name was \$11,147.57, and the sum found following the name of each signer of the paper, represented the amount due him, without reference to that by him stated in his libel, in which he endeavored to reach what had fallen due within the three months preceding the filing of the same. Karr, himself, in his own, did not claim above \$2,500.

The libels in the main were brought to enforce liens for supplies, repairs, etc. But there were several other classes of claims, which were sought to be enforced as liens. H. Luhrman and John Long claimed the right to proceed against the vessels by reason of the fact that they had leased and rented, for the term of one year, running from the 10th of June, 1876 to the 10th of June, 1877, * * * the bar privileges on the decks and cabins.

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Besides these, there were a number of libels filed by insurance companies, claiming liens on the boats for unpaid premiums. There were other claims on which libels were filed, called C. O. D. claims. Many goods were delivered by the steamers at landings on the river for the shippers, the understanding being that the boat taking them would collect the money on delivery thereof, and on its return pay it over to the shipper; but this last-named agreement was not expressed in the bills of lading. Davis, a witness, who was clerk on one of the steamers, testified that, as a general rule, the boats charged per centage for collections, but in the particular case in which he testified, nothing was demanded for such service, as the shipper was a good customer. * It was insisted that these were contracts of affreightment. The bar leases, it was alleged, were charter-parties.

It was further urged by Neeley and Hanauer, who intervened by petition, that they had a prior lien on one of the boats—the Illinois, by virtue of their mortgage, at least, as to all supplies furnished subsequent thereto. Several other petitions were filed by general creditors, claiming proceeds under 43d rule.

The claimants by their answers denied that under the State or general admiralty law, any lien was given libellants for supplies, because the credits were not given to the boats in strict admiralty sense, nor was any necessity alleged or shown for such credits.

Captain Darragh, one of Jones' captains, purchased one of the boats, and the other two, claimants alleged, were bought in by parties acting in the interest of Jones, though there was little or no proof on this latter point. The vessels brought \$22,900 at the sale. The claims proven amounted to \$27,386.

The United States District Attorney intervened for the government, claiming liens for hospital dues; and there were

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claims also for wharfage. There was proof to show that the company, by Cheek, the superintendent, was in the habit of making notes to different persons furnishing supplies and repairs, for articles so furnished, and that the same had been so taken. The proof tended to show that the company was in the habit, now and then, of borrowing money out of bank, and that in good seasons the boats did a large and profitable business. During the season of 1876—1877 it was not good; the navigation of the river being interrupted by ice, was one of the reasons.

On the 24th day of February, 1877, without a trial of the questions, it was referred to a commissioner to take and state an account of the amounts due different parties, and to report not only what was due libellants, but the character of their claims, and also their priorities under the admiralty law. This report was made and filed February 4, 1878. The commissioner reported the sale of the boats under a former order, and the rank of priorities. He allowed, 1st, seamen's wages (these had already been paid), the bar leases and hospital dues; 2d, C. O. D. claims; 3d, material men and supplies furnished in home port. The fund was nearly exhausted after paying these, else (as stated by him) he would have allowed, as next claim, the mortgage of Neely & Hanauer, and afterwards the general creditors. To this report many exceptions were filed by different parties on various grounds. Judge TRIGG heard the argument on the exceptions in the spring of 1878, but after the lapse of nearly a year made no decision upon the matter. The questions in dispute were then brought before Judge HAMMOND.

The State Boat Act is referred to and quoted word for word in the opinion of the court.

The claimants were represented by *Calvin F. Vance*, *W. W. Murray* and *Wm. S. Flippin*.

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The following proctors appeared for other parties: *H. C. Warinner, R. D. Jordan, Thos. W. Brown, O. P. Lyles, Humes & Poston, Wat. Strong, Pierce & Dix, Weatherford & Estes, Harris, McKisick & Turley, Adams, Dixon & Adams, L. & E. Lehman, Gantt & Patterson, D. M. Scales, S. S. Garrett, John B. Clough, Ass't Dist. Attorney, and Myers & Sneed.*

MR. JORDAN argued, that libellants stand before the court as supply and material men, seeking by a proceeding *in rem* in admiralty to enforce a lien, given by the statute law of Tennessee, for articles furnished and delivered in the home port to the steamboats libelled and seized within the ninety days prior to the filing of said libels.

These supplies consisted of coal, ship stores, furniture, repairs and other articles needed on the three steamers, furnished upon a contract with the masters thereof. These were beyond doubt maritime contracts. See *The Lottawanna*, 21 Wall. 598-580, and *The St. Lawrence*, 1 Black. p. 522, that in all cases where the local law gives a lien courts of admiralty will enforce the lien upon the ship *in rem*. *The Gen'l Smith*, 4 Wheat. 438; *Peyroux v. Howard*, 7 Peters, 324; *The Orleans v. Phæbus*, 11 Pet. 175; *The St. Lawrence*, 1 Black, 522. Unquestionably, it is the local law that gives the right, and such right is administered according to that law. That was so under the former rule of 1844. Unless there be ambiguity or doubt, these liens will be so found; otherwise, according to the principles of maritime law. 2 Pars. Ad., 324 and cases cited in note; *The Young Sam*, 608-610, 20 Law Rep.; 1 Conkling's Adm. 7-19 and 201; *Peyroux v. Howard*, 7 Pet. 324; *The St. Lawrence*, 1 Black, 522; *The Lottawanna*, 21 Wall. 579. And see Code of Tenn. Sec. 1991, which is very clear and does not admit of a doubtful construction.

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Proceeding under this statute, we have only to allege and prove that, under a contract with the master or owner of the vessel, the materials or articles were furnished for or toward the repairing, fitting, furnishing or equipping said vessels.

The allegations and proof show that the articles were furnished and the repairs were done on the credit of the vessel.

I insist that this, however, is not necessary in the case of material men enforcing a State lien against a vessel in her home port, for articles and repairs furnished and done in her home port. The only attempt at authority for such a position, is an *obiter dictum* in the *Lottawanna*, 21 Wall. 579, *et seq.*

The new 12th rule does not require that it shall be alleged and proved that credit was given to the boat, nor does it require that we should allege and prove that the owners were insolvent, and the supplies and repairs were necessary. Unless it should appear that supplies were enormous in amount and the repairs unreasonable, the presumption of law is that those things, which appear to be furnished to a vessel under that head, are necessary, and the burden of proof rests on the claimants to show otherwise.

It nowhere appears in any way, shape or form, that Brown and Jones accepted the trust deed. This trust deed is void: First, by reserving on its face a benefit for the makers; Second, it unreasonably prolongs the time of sale, as against the rights of parties secured by express statute.

Being void, there could be no legally binding acceptance under said trust deed by any one—not even by Jones. *Burrill on Assignments*, 255–257, 345–346. In the absence of proof that the general creditors accepted under the trust deed, the presumption is that a trust deed being for their benefit, they accept the terms of it and take their rights under it.

But as to those libellants, who furnished supplies, mate-

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rials and repairs within the ninety days prior to the date of the deed, it was against their interest, and a positive injury, for they were a favored class of creditors under the State law. The presumption arises in their favor that they did not accept.¹

Mr. VANCE dwelt particularly upon the effect of the trust deed taken by Jones. He said: Jones not only received a delivery of the deed but acted under it for a month. He never declared an abandonment of the trust but had a sale of the boats made under it by the court, and only declared that, if necessary, he would declare an abandonment of the trust. He never, to this day, filed a deed to the property to any one.

In whom did the property in these steamboats vest by the conveyance in trust? In N. M. Jones. And the power was coupled with an interest which, in the language of our Supreme Court, is irrevocable. *Milburn v. Spofford*, 4 Sneed, 699.

Could the estate divest by his mere unwillingness to act? The law says that he could not rid himself of the trust he had assumed without the consent of the *cestuis que trust* and the decree of a court. *Jones v. Stockell*, 2 Bland, 409; *Cruger v. Halliday*, 11 Paige, 814; *Breedlove v. Stump*, 3 Yerg. 257; 4 Vesey, 100; 1 Atk. 18; 1 Jac. & Walk. 689.

In *Maxwell v. Finnie et al.*, 6 Coldw. 434, our Supreme Court decide that, in a proceeding to remove a trustee, all the parties interested must be made parties to it, the debtor, as well as the creditor and trustee. And so particular are the courts as to the appointment of new trustees, that, in *Watkins v. Specht*, 7 Coldw. 595, the court held that a court could not appoint one, where the original trustee died; the

¹ Mr. Warinner, who argued all the questions elaborately, though requested so to do, failed to furnish the reporter with a brief, and no others were handed to the reporter, except the ones mentioned herein.

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heirs of the dead trustee not being made parties to the proceeding.

Evidently, the provisions of our code show that a trustee can neither resign his trust nor be removed, without the interposition of a court.

Mr. FLIPPIN.—If the position which counsel assume is correct—that material men have a lien irrespective of any other consideration, by virtue of the State statute giving a lien (conceding for the sake of argument that it does give such a lien) then a State lien is higher than a maritime lien in a home port. Yet how anomalous this would be, for the courts decide that liens of material men, claiming under the general maritime law, are to be preferred over—what are by some called—*quasi* maritime liens under State statutes. The *John T. Moore*, 3 Woods, 61. To state the proposition is to refute it.¹

Counsel ask of what benefit is it for them to go into the admiralty court, if the law is as I contend. The answer is easy. A sale of the vessel under the State law gives no good title; besides, it is necessary to apply by petition to the circuit judge to obtain permission to have an attachment to issue, which he will only grant upon good cause shown. This of itself involves delay, whereas in the admiralty all that has

¹ See what is said in *The E. A. Barnard*, 2 Fed. Rep. p. 721. Speaking of priority as between maritime and State liens, BUTLER, J., says: "They, the latter, are *quasi* maritime, have uniformly been so considered by the courts, and are recognized and allowed only after all maritime liens proper are paid. The creditors holding them are citizens of the State, and it is provided to direct the order in which their claims shall be paid. To allow State legislation a greater effect would be to concede the right to alter and change the maritime law of the nation in a most material respect. The right to so change and alter has been most emphatically denied, (as in principle it must be,) whenever the subject has been mentioned. *The Lottawanna*, 21 Wall. 580; *The St. Lawrence*, 1 Black, 522; and other cases therein cited.

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to be done is to draw a libel, give security, and the process issues. And this is what Judge BRADLEY means when he speaks of "obstructions and embarrassments" arising under the State liens. *The Lottawanna*, 21 Wall. 579. The new 12th rule gives its own meaning in clear language. No intention is manifested to put home and foreign ports in the same rank. Nor to make liens, enforceable in home ports, equal to admiralty liens, but simply to provide that, as in a foreign port a libel may be filed if according to the rules of the maritime law, the same thing may be done in the home port when conformable to admiralty rules. No other change was intended. The presumption of credit was not altered, nor the necessity for the same. Need it be said that if Congress was by act now to place home and foreign liens on a basis of equal rank, that the rules of the admiralty as to credit and necessity for credit would still apply?

Congress may regulate liens, the Supreme Court may provide rules, but the general admiralty law is and will continue to be part and parcel of any system that may be adopted. Liens will never be given where no necessity for credit exists.

These libellants had a right under the State law to seize these boats—no one questions that; but they give credit only to the owners in such cases and not to the boats. See case of *E. S. Waggoner et al.*, South. L. Rev., vol. 3, No. 4; 10 Heisk. 503; where Judge FREEMAN puts his decision on the ground that the State proceeding is not *in rem*, but against the owners of the boat, citing *Hine v. Trevor*, 4 Wall. 556; *The Moses Taylor*, 4 Wall. 424; and *The Belfast*, 7 Wall. 624; and showing wherein our statute differs from other State acts which recognize proceedings *in rem* under State statutes. According to our statute in State practice, after judgment had against the owner, an execution issues against his property, and can be levied upon the boat attached, or anything else the owner has. See 10 Heisk. 503.

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In the admiralty such liens, as we have already said, cannot be enforced unless the credit is given to the boat, and not to the owner. The rule is, whether there is a lien capable of being enforced or not, the owner is always bound, but the ship is a distinct person and cannot be bound at all, unless credit is given to that, and not to the owners. 14 Am. Law R. p. 84, *per* MILLER, J.

This same judge (same case,) gives the test of credit. He says: "That is determined by the intention of the party at the time of giving it." Acting upon this rule, and referring to the libels and proof, it will be readily perceived that none of the articles furnished were upon the credit of the boats in the admiralty sense. For many of these notes were taken, while in others there is no allegation of credit being given to the vessel, and certainly no proof. The allegations of credit, when made, rest simply upon the fact as to how the charges were made upon the books.

Liens are discouraged, and are in no case acquired, by material men, when the owners are present, unless the former are insolvent, or the credit necessarily is given to the vessel. 19 How. 359; 20 How. 393; 22 How. 129; 23 How. 193; and *Taylor v. Commonwealth*, 13 A. L. Reg. 502. It would seem that these principles are too well settled to admit of argument. If it were shown that the Mem. & Vicksburg Packet Co. was insolvent at the time the supplies were furnished and was refused credit, or was in such financial difficulties that no prudent man would credit it, such fact would go far towards making out a case against the vessels. But no grounds like these are alleged in any of the libels, unless the exception be in the amended ones of Karr, filed February 26 and March 14, 1877, which declare that the company was insolvent at the time the supplies were furnished; but they do not allege this as a ground for necessity of credit. It was clearly an after thought, and the ninety days had already

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barred nearly all the items of the account. Neither was there proof that such insolvency existed, nor of any necessity for credit at that time.

Credit must be given to the boat before the lien attaches. And this ought to be the law for the plainest reasons. If it were otherwise, unscrupulous creditors could make out and present unjust bills, and if not settled upon the spot, threaten the boat with a libel; or becoming offended with the owners for some petty difference, such as a transfer of their custom to another house, or for some other interested motive, would have it in their power just at the moment of sailing, to seriously embarrass the movements of a vessel. More than that—if some shrewd person should ingratiate himself into the confidence of a few larger creditors, he might compel an assignment at almost any time, as that would be deemed better by the owners than to be libelled at an inauspicious moment with ruin staring them in the face.

I contend that this State gives at least only a doubtful lien. And this court, not the State Court, is to construe that lien. In this particular case, in the absence of other reasons, it becomes necessary.

Judge TURLEY declared in 5 Sneed, 391, that the proceeding contemplated by the statute is against the boat, * * * it is required to be against the owners of the boat * * * but not for the purpose of enforcing satisfaction of the debt by a judgment against them personally.—A State cannot execute a process *in rem* by proceeding against the boat as a boat, for that contravenes the doctrine in *The Hine & Trevor*, *The Belfast*, and *The Moses Taylor*. Judge FREEMAN'S construction of this statute has already been given, the opposite of that of Judge TURLEY.

According to the former ruling the statute would, in effect, amount to concurrent jurisdiction with the admiralty court, while in the latter the proceeding would be a mode of simply

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bringing the owner into the State Court for the purpose of compelling him to give security for his debt. It will be seen that it would be unsafe for the admiralty in causes of this kind to accept the construction of the Supreme Court of the State. Having exclusive jurisdiction it has the exclusive right to construe this class of statutes, and should not abandon that prerogative. It is to fix the limits of State action with reference to its own jurisdiction, and not for the highest court of the State to do that for itself. While this court will follow the interpretation of a local statute given by the Supreme Court of a State, it never follows such laws, or the construction of laws in a State as interferes with its own jurisdiction or with the general law. And this applies to cases in common law, equity and admiralty equally. See 21 Black, 418; 8 How. 495; 16 Pet. 1; 16 Pet. 495; 13 How. 218; 4 How. 358; *Watson v. Tarpley*, 18 How. 517.¹ The construction of an old English statute by a State Court does not bind this court. Construction of the statute of limitations by the highest court of a State does bind, but where the statute of 21 Jac. 1, ch. 6, is only partially altered, the construction of the statute by the State Court as to the altered parts binds, but not as to the general terms of the statute. This court is bound only by constructions of State Courts as to local laws, but not by constructions of laws or statutes which are in general acceptance. Clearly, therefore, the construction of a State Court as to the words "fitting," "furnishing," and "equipping," when applied to boats, does not bind this court, for these are words that peculiarly and exclusively pertain to commerce and navigation.

Now it is not insisted here that the State can give the statutory lien upon any other than a maritime contract. The first part of the statute, fixing a lien upon "building," etc., does not figure here. The contention is, What do the words

¹ *Sandford v. Portsmouth*, in this volume.

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immediately following mean? "Materials or other articles furnished, for or towards the repairing, fitting, furnishing or equipping such boat." It includes evidently such materials or articles as are used in furnishing, fitting, or equipping the boat at the beginning of its career, and afterwards such materials as are used in repairing it. See *Roach v. Chapman*, 22 How. 129, (and *Edwards v. Elliot*, 21 Wall. 532,) where it is ruled that furnishing an engine—or fitting the boat with an engine—was not a maritime contract. Materials towards fitting, furnishing or equipping a boat are clearly not maritime contracts, for these relate exclusively towards finishing the boat. They are simply land contracts. If the libels, founded on the statute, are good for anything, only those which are for repairs and material therefor fall within the favored class. "Equip," when applied to a ship, means to dress it, to furnish it with a complete lot of articles necessary to it, *qua* ship. "Furnish," is in this connection, to fit up, to equip. "Fit," refers in nautical language to furnishing a ship with men and necessary tackle, equipage, etc. In certain cases "furnish" may mean more; not so here.

But to settle this matter beyond dispute—the caption to the act of 1833, carried into the code sec. 1991, is as follows: "An Act for the Benefit of Mechanics." If it is still the law that the caption of an act is a part of it—if that is the key to unlock and disclose the intent of the legislature—then it is plain that only builders and repairers and materials for repairs were to be favored. The original act is repeated almost word for word in section 1991. That reads as follows: "Whenever a debt shall be contracted by the master, owner, agent or consignee of any steam or keel boat, within this state, by and on account of any work done, or materials or articles furnished for, or towards the building, repairing, fitting, furnishing, or equipping such steam or keel boat, shall be

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a lien," etc.,—the rest of the section precisely as in sec. 1991. The word "consignee" is left out, but the sense, idea, and intention are the same as in the original act.

When we look at the Tennessee Act we see that there is no intention to establish a lien in favor of maritime contracts, nor a lien of a maritime nature, but its object is simply and solely to secure any one who might perform work on a boat and furnish materials or articles towards building, repairing, fitting, furnishing or equipping any keel or steam boat, or for supplies or wages due to hands. The legislature did not intend to give these parties any priorities over common law liens, as is clearly manifested by the eighth section of the act. Here is in fact a distinct announcement that such a provision or lien does not possess the characteristics of a maritime or quasi-maritime lien. And it would be difficult to enforce such a lien against boats under the new 12th Rule, it falling in that class of State liens which could with great difficulty be enforced and, perhaps, not at all, in some cases, in the admiralty.

The bar leases are in no sense maritime contracts. They are not charter-parties, no particular part of the ship being specified; nor are they contracts of affreightment, because such are made to take goods on at a certain place to be delivered at a certain other place. They have no necessary connection with commerce or navigation. Besides these leases were assigned, and the lien is personal. See Am. Law Times, vol. 14, April, 1877; *Morris v. McCullough*, S. C. Pa., Feb'y 22, 1877; *The A. D. Patchin*, 12 Law Rep. 21; *Reppert v. Robinson*, Taney's Decisions, 492-498; *The George Nicholaus*, Newberry, 449; *The Æolian*, 1 Bond 267; *The Freestone*, 2 Bond, 234-242; *Pierson v. Tinkler*, 36 Me. 384-386; 23 Me. 282; 40 N. H. 511; 5 English, (Ark.) 411. There are only two cases looking the other way; *The Boston*, Blatch. & How. 325, and the *General*

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Jackson, 2 Sprague, 554; but very peculiar circumstances surrounded them.

The conclusion is reached that there are no liens—neither maritime nor State—that can be enforced here by the libels, and therefore they should be dismissed with costs.

If, however, the Court should think the giving of credit to the vessels was not necessary in order to change the vessels—still the State lien does not cover more than the repairs—say \$1,500. Unpaid premiums of insurance are not, upon principle, liens, but if it shall be thought proper to follow the ruling in *The Dolphin*,¹ (approved with a reservation to hereafter differ,) by Judge SWAYNE, there would be a charge on the registry of \$1,500 more. The C. O. D. claims are not liens. They somewhat resemble contracts falling within the express business, but lack certain constituents. Perhaps they may be more properly classed under the head of banking or collecting—certainly, they are not purely maritime, or necessarily connected with commerce or navigation. Under the authority of *Kemp v. Caughtry et al.*,² 11 Johns. 107, the owners would be clearly liable at common law, but not so the ship. Had the master signed a bill of lading covenanting to return the money when collected, there is no doubt the vessel would have been bound because this would have been within his authority, but not so as to collecting the money. He had no authority for that to bind the ship. He entered into no agreement to do either the one or the other.

The claim of Neely and Hanauer is a legal lien. They have come in by petition under the 43d Rule, claiming proceeds in the registry to the amount of \$5,000, which arose from sale of *The Illinois*. They are entitled to that

¹ See 1 Flippin, p. 580, and note at p. 592.

² And see 6 Johns. 160 and 10 Johns. 1.

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sum, and the claimants willingly agree that it shall be paid. This with the two other claims, if allowed as liens, will swell the amount to be taken out of the registry to \$8,000.

I have not gone into the question of priority between mortgagees and material men, because I do not think the latter here have any lien.—The authorities are conflicting, but the weight seems to be in favor of the material men. 2 Hughes, 123; 2 Biss. 253; 1 Brown's Adm. 204, denying *The Grace Greenwood*, 2 Biss. 131; *Francis v. The Harrison*, 1 Saw. 373; *The Circassian*, 1 Ben. 129. But while they have priority over a lien under the State laws, it does not relate back so as to give that priority. See 1 Brown's Adm. 204; *The Paragon*, 1 Ware; *The Minnie*, 6 Am. Law R. 328; 27 Ohio, 350; *Scott's Case*, 1 Abb. U. S. 342; *The G. C. Morris*, 2 Abb. U. S. 164; and see *The Mary*, 1 Paine, 180. There are other cases to the same point.

This is no court of bankruptcy or insolvency, and it is decided in *The Lottawanna*, 20 Wall. 221, and *The Edith*, 4 Otto, 519, that the proceeds arising from the sale, if unaffected by lien, become by operation of law the absolute property of the owner—citing 2 Sumn. 443; 5 Pet. 675; *Browning & Lush*, 87-91; 2 Cliff. 448; 6 Wall. 30. The admiralty court is invested with no jurisdiction to distribute such property of the owner any more than any other property belonging to him. Where there is an application under the 43d Rule for remnants, and the owner does not oppose, such may be paid out—not otherwise.

MESSRS. HUMES & POSTON: On a correct construction of the Tennessee statutes creating this lien, the priority between a mortgage and home claims for supplies, materials, etc., is determined by the order of time in which the registration of the mortgage and the creation of the home claims occurred. Claimants under the State lien were not intended by the legislature to have priority over common law liens, which is

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shown by the eighth section of the act, providing "that where there are prior liens on said boats by judgments obtained by the general creditors of the owners, it shall be the duty of the sheriff to attach such boat, subject to such prior liens, and only the surplus over such prior lien shall be paid into court for distribution."

The requirements of this section unmistakably show that the Legislature did not intend to create a lien of the nature and character of a maritime lien, for here they expressly make the lien they are creating subject to a judgment lien of general creditors of the owners in a common law court. An express negation of this lien possessing the nature of a maritime lien is contained in the statute. The statutory lien is given by the same terms to builders, material men, and mariners (hands), and puts them all on the same footing, not preferring mariners' wages as a court of admiralty, but compelling them to share *pro rata* with builders and all others entitled to the statutory lien.

The lien given by the State statute is to be enforced in accord with the construction of the statute by a local law. *The Lottawanna*, 21 Wall. 578; *The Edith*, 4 Otto, 518.

On preference between mortgagees and material men and waiver the following cases were referred to and discussed: 1 Abbott, U. S. R. 336; *Scott's Case*, 1 Newb. 176; 2 Biss. 131; *The Skylark*, 2 Biss. R. 251; 6 Bissell, 369 (*The Kate Hinchman*); *Miller v. Alice Getty* (contained in this volume); 1 Brown's Ad. R. 202; 2 Pars. Ship. and Ad. 152; *Brig Nestor*, 1 Sumn. 87; 12 Wheat. 6-11; 2 Hagg. 136; 7 Peters, 345; 1 Black. 532; 3 How. 573; 1 Bond, 190; 1 New. 186; 7 Heisk. 612; Id. 617; 2 Hum. 248; 2 Head, 128; 3 Hum. 616; Mart. & Yerg. 309; 9 Penn. St. 203.

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HAMMOND, J.—The first question in this case arises out of the claim to a lien by those parties who have furnished supplies, materials, and repairs at Memphis, the home port. The lien is claimed under a State statute, which reads as follows: "Any debt contracted by the master, owner, agent, or consignee of any steam or keel boat, within this State, on account of any work done, or materials or other articles furnished for or towards the building, repairing, fitting, furnishing, or equipping such boat, or for any wages due to the hands of the same, shall be a lien upon such boat, her tackle and furniture, to continue for three months from the time said work is finished, or said materials or articles furnished, or said wages fall due, and until the termination of any suit that may be brought for said debt." Tenn. Code, (T. & S.) sec. 1991.

There may be incongruity in the doctrine that, an Admiralty Court possessing under a grant in the Constitution of the United States exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction (Rev. Stat. sec. 563, sub-sec. 8), shall find any rule of conduct in a statute of a State; it is not, however, anomalous when we consider that the Federal courts often find themselves in other departments of the law, administering rights and rules of property having no other foundation than State statutes or local custom. But whether incongruous or not, it is now the settled law of this court that "so long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessities to a vessel in her home port may be regulated in each State by State legislation." And, "The District Courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the State laws." *The Lottawanna*, 21 Wall. 558, 580; *Norton v. Switzer*, 93 U. S.

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355, 366. And it is just as well settled by the same cases and prior adjudications that for material men furnishing necessities to a vessel in her home port by the general maritime law of the United States there is no lien, other than such as is given by the local law. *Id. The Edith*, 94 U. S. 518.

This is now a principle of our maritime law too firmly established, whether correctly or not, to admit of further controversy in the inferior courts. It would be profitless to follow the perplexities of this subject by any attempt to reconcile the cases, or the criticisms that have been made upon them. 5 Am. Law Rev. 581; 7 Id. 1; 9 Id. 638; 6 Am. Law Reg. 596, note; 7 Id. 513; 14 Id. 593; 18 Albany L. J. 191. Nor need we consider any difficulties which may arise in practice as having any influence here to limit the rule laid down for our government in the matter. Until Congress does legislate, the courts must wrestle each with the demon of its own distraction, and follow that of the Supreme Court whithersoever it shall go, deciding each case as it arises according to its own circumstances. *The Theodore Perry*, 8 Cent. L. J. 191.

It is argued by the learned counsel for the claimants, with great confidence, and the argument is pressed with the earnestness of conviction, that, because by the general maritime law no lien for supplies exists, whether in a home or foreign port, *unless credit be given to the vessel*, it is not competent for the Legislature of the State to expand the lien and give any more enlarged right. It is said that this State statute must be construed as if it read, "any debt contracted by the master, etc., *and when the credit is given to the vessel*, shall be a lien, etc."

Much proof has been introduced by both sides. On the one hand to prove that credit was in fact given to these ves-

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sels, and on the other that it was not. The result of it all is, that if it is necessary to the existence of the lien to show that credit was given to these vessels in the sense of the general maritime law, I have no doubt the proof falls short of such a showing, and that it does show that this company had abundant credit at home, where the supplies were furnished, to have procured them without reference to any lien. The presumption of law is that they were procured on the credit of the owner when furnished in the home port, and I think the proof does not rebut that presumption. At all events, I shall assume, for the purposes of this judgment, that such is the state of proof.

But I do not think it at all essential to the lien that the credit should have been given to the vessels. The statute does not say so, and it would be an interpolation to attach any such condition to it. Ordinarily it would seem clearly within the power of a legislature, authorized to legislate on the subject of maritime law, to exercise the same freedom of enactment that it possesses over other subjects, and prescribe the limitations of the statute according to its will. If the States have left to them any power of legislation (and this we cannot now doubt), having for its object the security of maritime contracts by providing liens for them, it necessarily follows that there is no limitation to the power except such as is found in the State or Federal Constitutions. That it may create a lien is manifest, for in this very class of cases, it having been determined that by the general law there is no lien, the narrow one insisted on by the claimants here is as much a creation as the broader one claimed by the libellants. It will not do to look to the continental maritime law of Europe, or other countries, to find limitations on the power of the Legislature of the State of Tennessee. Granted that by that law no lien exists for supplies unless credit is given to the vessel, *non constat* that a lien may not

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be created by competent legislative action, which dispenses with the limitation as to credit, or rather creates a lien without reference to that fact. It would not be denied that the legislative authorities of continental Europe, from which it is said this lien is derived, might alter it and declare a lien in cases where credit was given to the owner; then why may not the Legislature of Tennessee do likewise, particularly since it has been finally determined that, as to this lien, the general maritime law is not in force in this country? Not being recognized here, it seems to me we cannot regard it as furnishing in its limitations any principle of construction for our own laws, and that we may regulate the lien as we please.

But this is said to be a jurisdictional question, and that the necessity for construing this statute as giving a lien only where credit is given to the vessel arises out of the constitutional restriction of our jurisdiction to "cases of admiralty and maritime jurisdiction." (Const. U. S. Art. 3, Sec. 2.) It is argued that unless credit is given to the vessel it is not a *maritime* lien, and therefore not within the Constitutional grant.

This is the question over again which has become chronic in the courts of admiralty, namely, whether we are confined to the maritime law as it existed when the Constitution was adopted, or may expand the jurisdiction to meet the wants of commerce and navigation, and so keep pace with the growth of civilization. The Supreme Court have time and again ruled that this clause in the Constitution is not to be so strictly construed as to defeat the capacity for expansion, and that we are not limited to either the maritime law of the civilians or that of our mother country. *Ex parte Easton*, 95 U. S. 70.

The development of this view of admiralty jurisdiction, in the face of much prejudice, is one of the most interesting

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examples of the elasticity of our laws in accommodating themselves to the exigencies of our progress as a people. See 18 Alb. Law Journal, 191, and 5 Am. Law Rev. 581, where the cases are grouped, and *Hine v. Trevor*, 4 Wall. 562.

There is no limitation of the legislative power to be implied from this restriction on the judicial power. Whether legislative control of the subject is vested in Congress or in the State legislatures, concurrently in both, or partly in one and partly in the other, it is absolute; and whether we look to the one source of legislation or both in a given case, the judicial power is competent to afford a remedy to enforce whatever rights it may be found the Legislature has created. It is sufficient for our purpose here that the highest court, having charge of the jurisdiction, has said that, as to this lien, by whatever name you call it, which secures a maritime contract, the States may legislate and this court enforce the legislation. *Ex parte McNiel*, 13 Wall. 236-243; *The Lottawanna*, *supra*; *Norton v. Switzer*, *supra*, and the cases cited in 5 Am. Law Rev. 614. It seems to me not inappropriate to call any lien which secures a maritime contract, whether given by the "venerable law of the sea" or by a statute passed to create it, a maritime lien, and in this sense it would satisfy the terms of the constitutional grant, and proceedings to enforce it would be a case of "maritime jurisdiction." 5 Am. Law Rev. 603, 613; 4 Am. Law Reg. 599. But as I understand it the jurisdiction does not depend upon the *lien*, whether maritime or statutory, but solely upon the character of the *contract* itself, irrespective of the lien. If the contract be maritime, this court has jurisdiction to enforce it, proceeding either *in personam* or *in rem*, as the case may require. It is true that in the case of *Edwards v. Elliott*, 21 Wall. 556, the court say that "State Legislatures have no authority to create a maritime lien; nor

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can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem*, as practiced in the admiralty courts," and this formula is repeated in *Norton v. Switzer*, 93 U. S. 356, and elsewhere in the cases. In the first case the court decided that the *contract* was not a maritime one, being a contract to build a ship, and, therefore, while it was competent for the State Legislature to create and enforce any lien in reference to it deemed expedient, it was not such a lien as a court of admiralty could enforce. In the second case the contract was that of a master to superintend repairs, and it was held no lien existed except in cases where the lien is created by statute, and the case reasserts the doctrine of *The Lottawanna*. It would seem from these cases and others that the court does not treat the lien for supplies at the home port, given by the State Legislature, as a maritime lien, and this would seem to militate against the idea that it should be a maritime lien in order to render the statute valid. They treat it as a statutory lien, or lien by local law, and claim the jurisdiction only because the contract is maritime. 5 Am. Law Rev. 581, 603; *The Orleans*, 11 Pet. 173, 184, and other cases cited above. In the case of *The St. Lawrence*, 1 Black, 522-529, it is said that "the right to proceed against the property *in rem* is a mere question of process and not of jurisdiction." And the court held that where, upon the principles of the maritime code, the supplies are presumed to be furnished on the credit of the vessel, or where a lien is given by the local law, the party is entitled to proceed *in rem* in the admiralty court to enforce it; but where the supplies are presumed by the maritime code to be furnished on the personal credit of the owner or master, and the local law gives him no lien, although the contract is maritime, yet he must seek his remedy against the person and not against the vessel. In either case the contract is equally within the jurisdiction of a court of admi-

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ralty. This would indicate very clearly that the Supreme Court did not conceive the idea that the lien must be maritime in the sense that credit must be given to the vessel where the party relies on the local law, or that it is only competent for the local law to give the lien in cases where the credit is given to the vessel. Again: inasmuch as this alleged restriction on the legislative power arises out of the limitation supposed to be found in the Federal Constitution, it is as fatal to the power of Congress to create a lien where there is no credit given to the vessel as to the State Legislature, because Congress can no more enlarge the judicial power beyond the constitutional grant than the Legislature; and we have as the product of the argument, that no legislative power exists to advance us one step beyond the law of one hundred years ago; and it must be supposed, contrary to what was said in *The Lottawanna*, (21 Wall. 577,) that the framers of the Constitution did "contemplate that the law should remain forever unalterable."

Nor do I find it quite correct to say that by the general maritime law this element of credit to the vessel was essential to the existence of the lien given by that law. The lien for supplies attached *ipso facto* when they were furnished. But it was a lien easily displaced and was considered to be waived whenever the credit was in fact, or presumably given to the owner either in the home or foreign port. 9 Am. Law Rev. 638, 639-651; Mr. Justice CLIFFORD in *The Lottawanna*, *passim*. It seems that this element of credit given to the ship, as an essential condition precedent to the attaching of the lien, is the result of the modifications of the maritime law and acts of Parliament. *Id.*; *The Albany*, 4 Cent. L. J. 16. And while it must be admitted that wherever the lien finds its origin in the maritime law of our own country this feature of credit to the ship is indispensable, I do not think there is any want of power in the State Legislature or

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Congress to provide a lien for a maritime contract which does dispense with it, capable of enforcement in the admiralty courts. What has been said in support of this position is more in deference to the very earnest arguments of able counsel than from any conviction of doubt as to the proper ruling on the point.

The chief difficulty I have had with this statute proceeds from the construction given by the Supreme Court of Tennessee in the case of *Waggoner v. St. John*, 10 Heisk. 503. It will be observed that the code of Tennessee, sections 3550 and following, provides a statutory proceeding to enforce the lien given by the section above quoted. (Sec. 1991.) In order to sustain the jurisdiction of the State Courts over this lien the Supreme Court of Tennessee is at great pains to demonstrate that it is not an admiralty lien at all, but simply a remedy against the owner with ancillary attachment process to enforce a judgment against him. In the case of *The Edith*, 94 U. S. 518-523, it is said by the Supreme Court of the United States that similar statutory provisions for enforcing the lien in the State of New York had been adjudged invalid because beyond the power of the State Legislature. And, say the court, "if they are invalid, it may be doubted whether all the provisions purporting to give a lien are not also invalid, because inseparable from the prescribed means of enforcing it." But the point is not decided, and the court ruled against the lien in that case only because it had expired by limitation of the statute itself. It is to be carefully observed that while this case was finally decided in 1876, it arose before the promulgation of the admiralty Rule XII of 1872, and what is quoted above doubtless refers to the law as it was understood under the prohibitory Rule XII of 1859. Whether the courts of the United States would decide these statutory provisions for enforcing the lien, given by the Tennessee code, to be beyond the power of the State

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Legislature or follow the Supreme Court of the State in construing them, is not a question now presented for determination. See *Weston v. Morse*, 40 Wis. 455; 9 Chicago Leg. News, 75. If it be admitted that the ruling in *Wagoner v. St. John*, *supra*, is correct, or whether correct or not, binding on the Federal courts as a declaration of local law to which we must look for the determination of the rights of the parties as to the character of this lien, the question is, Are the means prescribed for enforcing a lien given by the statute so inseparable from the provisions of the statute creating the lien that they become a part of it, and serve to so characterize the lien as to altogether defeat the jurisdiction of the admiralty court." By the section 1991 a lien is given in terms broad enough to include any character of lien whatever, for there is absolutely no qualification to it, nor is it in terms described to be of any particular kind of lien. All the contracts, which it is given to secure, are *maritime* contracts, except of building boats or furnishing materials for building them; and as we have already seen, the contracts being maritime, this court, except as to the two non-maritime contracts above mentioned, has jurisdiction to enforce the lien as thus provided. Nothing can be argued from this separation of the sections (3550-3562,) which prescribe a remedy to enforce this lien in the State Courts from that which creates it, for they are all parts of the same act of 1833, chapter 35. How does the fact that the Legislature has provided a remedy to enforce in the State Courts a lien created by statute (which we have seen need not in itself be maritime in any other sense than that it secures a maritime contract to give *this court* jurisdiction to enforce it,) preclude this court from taking notice of the lien? If the jurisdiction here does not depend on the character of the lien, but only on the nature of the contract, I cannot see that we should be so precluded. Nor do I see any objection what-

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ever to satisfying the debt in either court to which the creditor may choose to resort. He has a security—created by statute—called a *lien*, which practically is nothing more or less than a right to seize and sell the boat by judicial process for the satisfaction of his debt. It is so defined in *Dupont v. Vance*, 19 How. 169. Cumulation of remedies is not anomalous, and creditors often have choice of several with distinctive advantages or disadvantages for each. Liens may be and are variously denominated as equitable, statutory, judicial, common law, maritime, or by some other description drawn from the connection they have with a particular subject, but it is in my judgment wholly misleading to found upon these distinctions any restrictions which take them out of the category of intangible privileges and erect them into substantial landmarks of jurisdiction. They possess no such quality, but on the contrary are mobile, wholly without inherent characteristics of their own, and dependent upon extrinsic circumstances for distinctive names. Mere securities for the performance of obligations, always the creatures of law, or contract of the parties, they take just such forms as are impressed upon them by the will of the parties or the law-making power. A lien is a right—*jus ad rem*, or *jus in re*—to be enforced by remedies such as may be ordained by the law, and never the source of these remedies. Liens do not create remedies and are generally wholly independent of them, one remedy serving to enforce different characters of liens oftentimes; sometimes the lien does not depend on the remedy but springs out of it; in cases like this they are so independent that they may be created by State statute and the remedy by Federal law. Hence, it seems to me the lien provided by this statute, may, if the creditor resorts to a proceeding *in rem* in the admiralty court, take on the form and be called an admiralty or maritime lien because attached to a maritime contract, just as a mechanic's lien is so called

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because attached to a mechanic's contract, (although the name is wholly immaterial,) or if he resorts to the State Court, takes the form and character of an attachment lien as described by the Supreme Court of Tennessee. The State Court has jurisdiction (if it has) because the Legislature, by its act, has authorized it to take hold of the property of a citizen in a particular way and satisfy the debt, and not because it is a lien of any particular description. And we have jurisdiction here—because Congress has vested us with jurisdiction of maritime contracts and authorized us to take hold of the property in a particular way and satisfy the lien, and not because it is a particular kind of lien. It is not the *lien* that gives us jurisdiction; it is the contract. The particular way of the State Court, that is, a proceeding by summons and attachment is not within our jurisdiction, nor is our particular way, that is, a proceeding *in rem*, within their jurisdiction; not because in either case of any inherent nature of the lien, but because in the one case the State Court has not had granted to it the power to proceed irrespective of the ownership *in invitum* against the *res* as the offending thing for a decree of sale, which will bind all the world and give a good title to the purchaser; and in the other this court has not had granted to it the power to adopt a peculiar statutory remedy found in the statutes of the State; but has had a grant of power to look to the statute of the State to see whether any security has been given upon a maritime contract, which so attaches to a vessel engaged in maritime commerce, her tackle, apparel and furniture that it can be enforced by admiralty process. If so, we will resort to that process to satisfy that security whenever the *contract* is maritime, and never otherwise.

I have no doubt that if the lien sprung out of *the process of seizure* pointed out by the statute and depended for its existence upon the issuance or levy of that process, or, in

other words, if it were a lien similar to that of a levied execution, this court could not enforce it for the obvious reason that it would be the creature of a process this court could not issue. But it is not such a lien; it is the creature of the statute, attaching by virtue of the issuance or levy of the process. Some of the contracts to which the lien attaches are maritime and some are not, as we have seen, but they all depend upon the contract and not the remedy. It is the subject matter of the contract in all of them which determines the question of lien or no lien, and not the fate of the process. Whether the process is served or levied, or not, the lien continues to exist. It is more analogous to a judgment lien for the enforcement of which the execution is only a proper process, and it exists as independently of the process issued to enforce it as does a judgment lien. And this is all, I think, the courts mean when they say, as in the case of *The Edith*, *supra*, that the lien must be separable from the means used to enforce it to be cognizable in a court of admiralty. Now, when the State Courts come to provide the means to enforce a lien on ships engaged in commerce, given by State statutes, they must be careful not to invade the exclusive domain of the admiralty jurisdiction and undertake to sue the *res*, or to give their decrees the force and effect of a court of admiralty in such cases. They may seize the vessel as the property of the owner, but not as itself the defendant; they may, by their decree against the owner and order of sale, divest all persons of any interest which they claim by common right, but cannot divest any one of his rights under the maritime law against his will. Whether the proceedings are of this nature or not depends upon their own individuality, and not upon that of either the lien or the contract. The existence of the lien does not necessarily depend upon the question whether the proceedings are valid. If the security, or lien, that is, the right of satisfaction out

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of the proceeds of the sale of the vessel, depends on or grows out of the proceedings themselves in the manner I have indicated, of course, this right must stand or fall with the proceedings. But if these failing, this right of satisfaction out of the thing still exists, whether there be any adequate remedy to enforce the right or not, it still has a potential existence as a right of property, and if given to a *maritime* contract this court will, by virtue of its admiralty power, afford a remedy either *in personam* or *in rem* according to its practice.

Because it is a lien attached to a maritime contract the States are not forbidden to provide non-maritime remedies to enforce it in their courts. They can provide no *remedies* for the admiralty courts, nor any for their own which amount to such as the admiralty courts use—but as to all others they are free to use them. Irrespective of those used by the State Courts the admiralty courts will proceed in their own way to enforce whatever right of satisfaction out of the *res* may be found in the statute which is independent of any of the remedies available to the creditor. I think the judgment I now give, as expressed in this opinion, is the logical result of *Ex parte McNeil*, *The Lottawanna*, *supra*, and the action of the Supreme Court in abrogating the rule of 1859 and establishing that of 1872. Whenever the Supreme Court declared it to be an axiom of our national jurisprudence, as it did in *Ex parte McNeil*, that “a State law may give a substantial right of such a character that it may be enforced in the proper Federal tribunal, whether it be a court of equity, of admiralty, or of common law,” and in applying it to cases of admiralty jurisdiction directs us to the maritime character of the transaction itself as the sole test of jurisdiction, whether it took a new departure or not, it has cut loose from the confusion of the past, and started us upon a more hopeful basis for the administration of

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admiralty jurisdiction in cases like this than we had before.

It is in proof that about one month prior to the filing of these libels the corporation owning these boats conveyed them in trust to one N. M. Jones, for the general benefit of all the creditors, authorizing him to continue running them in the packet trade in which they were engaged, and if still unable to pay the debts, to sell them and distribute the proceeds *pro rata*. Jones went into the possession of the boats and did run them until seized in these suits.

It is argued that he instigated the libels, not from any proof of the fact but because he is on the cost bonds and paid the same after the libels were filed and before the sale. I think this is not material and do not see that any one was injured even if he did instigate the libels. Creditors were threatening suits, and it was apparent the scheme to work out the debts through the trust had failed.

It is very earnestly insisted by the general creditors that these supply-lien creditors have waived their statutory liens by taking notes and accepting this deed of trust, and that except as to the mortgages sanctioned in the trust deed all the creditors must share the fund equally; and they seek to claim the fund as remnants because of the lien of this trust deed. It is now too well settled to need much citation of authority that neither the taking of a note, nor other security is a waiver of the implied lien or the statutory lien unless it was so intended. *The St. Lawrence*, 1 Black, 522, 532; *The Kimball*, 3 Wall. 45; *The Bird of Paradise*, 5 Wall. 545-561; *The Napoleon*, 9 Chicago Leg. News, 280; *The Richmond*, 10 Chicago Leg. News, 216; *The Eclipse*, 3 Biss. 102; *The Dunlap*, 1 Lowell, 360; *The Theodore Perry*, 8 Cent. L. J. 191. To constitute an abandonment of a right secured there must be a clear, unequivocal and decisive act of the

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party, an act done which shows a determination in the individual not to have a benefit which is designed for him. *Breedlove v. Stump*, 3 Yerg. 257-276. No one is ever presumed to abandon a security the law gives him. *The Foster*, 3 Ware, 165. The burden of showing this intention to waive the lien is on the party who asserts the waiver. *The Guy*, 1 Ben. 112, 117. I should perhaps hold, if there were any proof in the record showing that these lien creditors had accepted this deed of trust, or, knowing of it, acquiesced in it, that *prima facie* their acceptance of it was from the nature of it a waiver of their liens, unless, by other proof, they should show that it was not so intended. But there is absolutely no proof whatever to show that any of them had accepted it, or knew of it, except Jones. It is said in argument, that the acceptance of the beneficiary will be presumed because the trust is for his benefit. It does not appear in the case that the trust was beneficial to the lien creditors. However, this presumption is only indulged in favor of the beneficiary, and not against him, and in the face of his protest against being bound by the trust. The presumption from the assertion here of the liens is that the trust was never accepted, until the contrary appears by proof.

As to Jones, he unquestionably did go into possession of the boats as trustee under the assignment, and the proof is clear that he was willing to accept it. Whether only as collateral to his statutory liens or in satisfaction of them, does not appear, but I think it clearly inferable from the circumstances that his acceptance of the office of trustee was in the hope of a successful experiment by which the debts should be paid. It was essential that all the creditors should acquiesce and go into the scheme of operating the boats through a trustee on their own account. This failing, I do not think he should be bound by his conduct to stand to the trust deed

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and be held to have waived his lien under the statute. The assent of a creditor to an assignment of this kind is coupled with the implied condition that other creditors shall also agree, and adversary proceedings by one of them would discharge him from his engagement. *Hay v. Heidelberg*, 9 Penn. St. 203. Nor does the fact that the creditor is trustee prevent him from surrendering the property and relying on his original contract. *In re Saunders*, 13 N. B. R. 164.

The result is, that all the claims for supplies will be allowed as liens under the statute wherever they come within the ninety days limitation prescribed in the statute. But all claims for supplies not covered by the statute will be disallowed because they are not liens, and it has been expressly held that the time limited in the statute is binding as part of it. *The Edith*, 94 U. S. 514.

C. O. D. BILLS OF LADING.

These boats respectively issued many bills of lading, of which the following is a specimen:

Shipped in good order and condition by W. & S. Jack & Co. on account and risk of whom it may concern, on board the good steamboat Illinois, whereof _____ is master for the present voyage, the following packages or articles, which are to be delivered without delay, in like good order, at the port of Mound Place Landing (unavoidable dangers of the river and fire only excepted) unto Indon & Haxter or their assigns, he or they paying freight for said goods at rate of _____ and charges—
C. O. D. \$18.10.

1 Bbl. Crockery, marked _____.

Signed,

PRIDDY, Clerk.

Dated Memphis, Tenn., Oct. 24, 1876.

It is proved by the testimony of witnesses that the letters "C. O. D." mean "collect on delivery," and that the masters made these contracts with the assent of the owners. It is further proved that the understanding was that the goods were not to be delivered to the consignee until the consign-

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or's price was collected from him on or before delivery, and that the money was to be then brought back to the consignor by the boat and paid over to him; that the usage and custom of the line was to envelop the money, seal the package, and mark the name of the consignor upon it, which said package was delivered to the secretary of the company at Memphis for delivery to the consignor. The money sued for was never paid over to the parties, but it does not appear when or by whom it was appropriated or used. The libels in these cases were filed December 13, 1876, and the "C. O. D." bills of lading bear date from the beginning of the season, as far back as July or before, on to the date of the libels; and the aggregate amount allowed by the commissioner is \$3,709.70. Hence it appears that it was not the custom to pay over or deliver these several sums of money, which it is claimed were shipped as so many packages of freight to the consignees thereof, namely, the original consignors of the goods; and it appears that these consignees were not very prompt in enforcing a delivery of their said consignments. I infer from these facts that the parties did not really treat the money as shipped to the merchants' part of the cargo, but rather as collections made for them. It is not usual to break open packages and appropriate articles belonging to the cargo, to the extent this was done, either by the officers of the boat or by the warehousemen with whom they are stored.

It is argued that the contract, as thus proved, is a contract for the affreightment of the money as well as the goods, and its breach gives the consignor a lien on the boat.

It is objected by the claimants that this parol proof is not admissible to alter the contract, as expressed in the bill of lading. Undoubtedly, ambiguities appearing in a written contract may be explained, and the letters "C. O. D." have come to be used as an abbreviation for "collect on delivery,"

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and to authorize the carrier to receive payment for the merchant. At common law I doubt not that such authority would imply a contract on the part of the carrier to be responsible for the money. The implication would not arise on the words "collect on delivery," but out of the contract of agency. Those particular words are an authority to the agent to receive from the debtor the money due the creditor, and an agreement with the agent that he will not deliver the goods until they are paid for by the vendee. This is all that can be implied from them, and when the words are written in this bill of lading it is no longer ambiguous. After they are filled in, to go and add a contract that the money shall be shipped as cargo, and that for its safe delivery the owner, master and ship shall be liable as on a regular bill of lading, such as would be taken if money were in fact shipped as merchandise, seems to me to be altering this written contract in very important particulars. If this was the contract of the parties, why was it not so written in full? It is not only the parties who are interested in having contracts written out which are to bind the vessel, but all who deal with her. This bill of lading, except as to these three letters, is in the usual form, a form sanctioned by centuries of use, and every word and sentence in it has become settled, and the liabilities created by it are as well understood as a common law deed to real estate. Even if it is competent for shippers to make the kind of contract, which it is insisted this is, it should be, when they undertake to reduce it to writing, included in the writing, and not left to implication. It is a wise rule which forbids parties after they have reduced their contract to writing to alter it by parol proof. "The bill of lading," says Valin, "is conclusive against the assured, and nothing can be admitted against its tenor." 2 Valin, 139, cited in *The Phebe*, 1 Ware, 275.

Although as a receipt, a bill of lading is subject to explana-

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tions and can be affected by parol proof, in so far as it is a contract this rule does not apply. The transfer of goods shipped, by indorsement of bills of lading, has become so common that the interests of commerce require that such instruments should not be controlled by parol evidence." Per MILLER, J. in *The Wellington*, 1 Biss. 279; and see the note for other cases. Says Mr. Justice STORY, in *The Ree-side*, 2 Sumner, 568: "I own myself no friend to the almost indiscriminate habit of late years, of setting up particular usages and customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well known and well settled principles of law." This case is often cited and approved by the Supreme Court, and it seems to me the rule which forbids the introduction of parol proof to vary written contracts should be the more rigidly enforced where its effect is to create a right of property, such as a maritime lien for breach of contract of affreightment. I have therefore concluded to rule in this case that the parol evidence, which is offered to convert this contract into a formal contract for the affreightment of the money, is inadmissible.

If admitted, I would rule also, that it does not constitute such a contract as creates a lien under the maritime law. I have examined carefully all the cases cited in support of the doctrine and am of opinion that it is a clear innovation on the maritime law. The custom is one of modern date, which secures the merchant the price of his goods by sending them under an agreement that the carrier shall not deliver them until the price is paid. It is merely a condi-

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tional sale for the security of the contract price. The carrier becomes the agent of the creditor for the collection of the debts, and whatever may be the common law liability of the carrier as to his personal responsibility for the money collected by his agents, I shall not, until the Supreme Court settle the question, be prepared to hold that there arises out of the contract, when the carrier is a vessel engaged in commerce, a maritime lien which can be enforced by a proceeding *in rem*. I have examined many cases to discover the principle upon which the doctrine rests that the merchandise is bound to the ship and the ship to the merchandise, and I do not see that it can be applied to contracts like this, in which the merchant, having sold his goods to his customer for convenience of collection and security, authorizes him to pay the price to the master of the vessel, and authorizes the master to collect it for him, or in default of payment to return the goods. I do not doubt but that the parties may by contract pledge the ship to the performance of the agreement including the safe return of the money collected, as is sometimes done in covenants inserted in a charter-party or bill of lading; and, perhaps, a court of admiralty might enforce the lien by proceedings *in rem*, as in those cases; but that is not the question here. Admit all the proof, and it is not even claimed that it goes to the extent of a *contract* pledging the ship in terms. The question is, does a lien arise by a tacit hypothecation of the ship on such a contract, under the maritime law? I think not. Any covenant outside the ordinary contract of affreightment would be secured only by a special contract for the purpose. The faithful performance of this contract of agency cannot be said to be secured as if it were an ordinary contract of affreightment for the money. Money may be shipped as merchandise, and on such a contract the liability of a contract of affreightment would attach. Here the master has no authority over

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the money except by reason of his instructions to collect it, and he is empowered to hold the goods till paid. The transportation of the money is not the object of the contract. It does not advance the argument to invoke the common law liability of common carriers. An express company would be personally liable, perhaps, under the strict rules of law governing common carriers for the misappropriation of the money on a "C. O. D." bill of lading, but there would be no lien on the cars or other vehicle transporting the goods or money; and so the owners of these boats would be personally liable at common law, but it is another thing to say that the *maritime* law gives a lien against the vessel which transports the goods.

The personal liability of the owner is not an element in the maritime law. The owner can, in cases where that law gives a lien, abandon his property in the ship, as in cases of salvage, for example, and relieve himself as to that law, from all personal liability whatever. The maritime law of the middle ages, we are told, imported into the ancient law of the sea the common law doctrine that the master is the agent of the owner, and may bind within the scope of his authority to a personal liability co-extensive with all his property in cases of contract certainly, and to a more limited extent in cases *ex delicto*; but when the master binds the *ship* itself by tacit hypothecation his authority, as agent, is not co-extensive with his authority in that capacity to bind the owner personally. The ship may be bound as a part of the property of the owner, like his other property, but it does not as a contracting thing, so to speak, become liable through a lien in all cases where the owner is liable personally. To earn freight is the highest duty of the ship acting through its master, and he may pledge *its* credit to that contract; he may bind the ship—if duly authorized—by special contracts of lien, but the lien is the product of the special

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agreement that it shall be a lien, not the product of the maritime law as a tacit hypothecation or pure maritime lien. We cannot overlook this distinction in determining the influence of the common law doctrine of agency as connected with the power of the master to bind the owner, and to bind the ship, and reach a conclusion as to whether a given transaction is within the scope of his authority. He may have authority, as agent, to bind the owner personally, and even to pledge by contract that the ship shall be liable for certain specified covenants in a charter-party or bill of lading, but it may not be within his authority as *master* to fasten to his ship a tacit lien for the security of extraordinary covenants, not specifically expressed in his contract, but implied necessarily from it. Judge WARE, of whom the Supreme Court say his opinion in matters of maritime law is entitled to the highest respect, *Ex parte Easton*, 95 U. S. 76, calls our attention to this distinction in the case of *The Waldo*, 2 Ware, (Dav.) 165. He cites the leading common law case, relied on here, of *Kemp v. Caughtry*, 11 Johns. 107, and points out that it is not an authority on this question; and I think the case is a very satisfactory authority against this lien, not so much as an adjudication but in the enunciation of a principle which must be of controlling importance. The cases cited in *The Ann Elizabeth*, (Dupont De Nemours v. Vance,) 19 How. 162, at page 169, are instructive on this subject, and open up abundant authority for the position taken here, that there are necessary limitations to the rule that the ship is tacitly bound to the merchandise for contracts of affreightment.

In *The Volunteer*, 1 Sumner, 551, it is said that the right to proceed *in rem* against the ship for breach of contracts in the charter-party, is founded on a stipulation in the contract that it shall be so, and not out of any *tacit* hypothecation, such as I am asked here to imply. *The Rebecca*, 1 Ware,

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187, states most clearly the principle on which the ship is held bound. And *The Phebe*, 1 Ware, 265, 277, points out that the master can only specifically bind the ship when acting within the scope of his authority as master. It speaks of a contract of sale *disguised* under a contract of affreightment. These cases are a guide to many more, which will illustrate the distinctions. The cases cited, in argument, of *Mosely v. Lord*, 2 Conn. 389; *Emery v. Hersey*, 4 Greenl. 407, (cited in *The Waldo*, *supra*;) *Taylor v. McShane*, 4 Watts, 443; *Pierce v. R. R. Co.*, 23 Wis. 387, are all in the same category that Judge WARE puts *Kemp v. Caughtry*, *supra*. *The Hardy*, 1 Dill. 460, is only a syllabus, and the opinion not being given, is not convincing. *Monteith v. Kirkpatrick*, 2 Blatch. 279, only holds that where the transportation was partly on waters not within admiralty jurisdiction, the contract was entire and not severable. *The Argyle Worthington*, 17 Ohio, 460, was under a statute of Ohio giving a lien in such cases, and perhaps, like supply liens in home ports, it is within the power of the Legislature to create such. The case of *The Emma & Zollinger*, 3 Cent. L. J. 285, is directly in favor of the lien, and against the views here expressed, but with all my deference for the venerable and learned court, I am constrained to dissent from it and follow the ruling in this circuit to the contrary by the late Judge EMMONS in the cases of *The Liberty* and *Commercial*, not reported, but cited by him in *The Williams*, 1 Brown's Ad. 221, by the name of *The Steamer Robinson*. It has always been a matter of regret that the learned judge did not write, as he intended, his opinion in that case. It is ingeniously urged that this case is a better case for the lien than the one decided by Judge EMMONS, and that the defects in the proof of that case have been supplied here. I was of counsel in that case for the liens, and I feel quite sure the learned judge would have decided this the same way. But whether

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so or not, I am content to take the broad ground that nothing less than a covenant to bind the ship to the faithful performance of the master's contract of agency in collecting the money for the shipper will create a lien in favor of such contracts, unless they are *bona fide* contracts of affreightment for the money as merchandise, which I do not think they are.

These claims on the "C. O. D." bills of lading are disallowed.¹

THE BAR LEASES.

When these boats commenced the season's business the owners made contracts for the bar privileges in the form of indentures, and they are called in the record *leases*.

In the case of the *Illinois*, the price paid was \$3,500 cash, in consideration of which "the parties of the first part hereby lease and rent to the party of the second part for the

¹ Using the first edition of the Revised Statutes while investigating the point, I came to the conclusion that the Rev. Stat. § 4281 did not affect the "C. O. D." bills of lading, because the section did not apply to the *rivers*. (See § 4289, 1st Ed.) But since the act of Feb'y 18, 1875, Ch. 80, 18 Stat. p. 320, Rev. Stat. § 4279, (2d Ed.) it probably does apply, and is a complete answer to the libels, since it is not pretended that that section was complied with.

The original act of March 3, 1851, § 2, 9 Stat. 635, was limited by the 7th section of that act so that it did not apply to *rivers*, and the first edition of the Revised Statutes, § 4289, so limited it. Now, by act of Feb'y 18, 1875, Ch. 80, 18 Stat. p. 320, this section 4289 is itself limited to the *same preceding sections*, which do not include section 4289; and it seems that section does now apply to *rivers*. The act of 1871, Ch. 100, § 69, without referring to the act of March 3, 1851, Ch. 43, § 2, enlarges that act as to articles enumerated, but otherwise repeals it *in hac verba*. Section 41 of the act of 1871, in terms applied the act to all vessels navigating the *rivers*. This section is carried into the Revised Statutes at section 4400. On the whole it is clear the section 4281 exempts these vessels from liability, even if this were a contract of affreightment for which the owners and vessel could be made liable.

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term of one year running time from the 10th of June, 1876 to the 10th of June, 1877—time to be * * * by the portage book—the bar privileges, deck and cabin, of the Illinois, the said steamer belonging to the Memphis & Vicksburg Packet Company, and is now running between Memphis and Vicksburg.” “It is agreed that there shall be but three bar-keepers and tenders, and in case the party of the second part shall not keep as good liquors as in other boats of the line or shall make themselves obnoxious to the detriment of the boat, the company reserves the privilege of re-entering, taking and retaining possession of the bar or bars at their option, unless the wrong is corrected and notice given, etc.; and in such case the party of the second part forfeits all moneys paid on said bars and all rights to further privileges of the same.” And it makes provision that the keepers or tenders shall be under command of the officers. Similar contracts were made as to the other boats in the line.

Being seized under the process here before the time expired, these libels are filed to recover back the money paid for the unexpired time, as damages for breach of the contract, and the commissioner has allowed an aggregate sum of \$5,052 as such damages, and as a preferred claim of the first class. There is no proof introduced to show what is meant by a bar privilege. I am asked to take judicial notice that a certain space in the cabin or on the deck is set apart as a “bar,” and it is then argued that this is a charter-party or contract for the hiring of that part of the boat known as the “bar,” and the failure to keep the charterers in possession is a breach of the contract of charter-party, for which the vessel is liable and a lien attaches.

This illustrates the tendency of all manner of claimants to relegate their claim to some form of contract, which shall carry a lien on the boat, and the capacity for expansion of these liens seems never to be wanting in time of need.

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It will be observed that no space measured by metes and bounds, or quantity of tonnage or aliquot part of the carrying capacity of the boat, is designated as the part let to charter. It is said, however, that by a well-known usage the *locus in quo* is fixed by the term "bar." It will be also seen that the instrument is not drawn on the theory that it is the charter of a part of a vessel for the purpose of carrying freight. But it is said that the charterer need not fill his space or use it for storing freight. He may, paying for it, let it go empty. This is so, yet it is plain that the leading idea of a charter-party is that the vessel or a part of her is hired for the purposes of commerce, carrying goods as freight, or passengers, or otherwise put to some use incident to commerce and navigation. And it is to encourage such commerce and navigation the lien is allowed for its breach. If a charterer lets his vessel or part thereof go empty, he may have to pay the charter money, but the vessel could not be liable to him for any breach, as none could probably occur.

I think this contract is just what it purports to be, a common law contract, for the sale of the privilege of selling liquors on the boat to three persons travelling on her. I think it just as well to treat it as a contract of affreightment for the liquors and bar-keepers, as was suggested and argued, as a charter-party, and that in no proper sense can it be treated as either. It is a mere license. The apple-woman, the newsboy, the book-peddler and lunch-vender, who have leave to ply their trade among the passengers while the vessel is afloat, or at shore; or the barber, who travels with her, may as well claim to be charterers as these bar-keepers. No case holding that a breach of such contracts is a lien has been produced.

But it is said, it has been ruled so in the cases of *The Liberty* and *Commercial*, *supra*, in this court. So it was, so

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far as confirming a report, wherein it was allowed is a ruling. It is true that an exception was filed, and the case being appealed, Judge EMMONS heard argument. He kept the cases under advisement, and my recollection is, when he returned he expressed no opinion on this bar-lease question but delivered an elaborate oral judgment on the main controversy in these cases, which was the question of C. O. D. bills of lading, and, that being an arrangement of counsel, the report was confirmed; each getting allowances excepted to and all satisfied in the general average. It was in this way the bar-lease question passed *sub silentio*. I have verified my recollection of the circumstances by that of other counsel not engaged here, and I do not understand that it is insisted that Judge EMMONS gave an opinion, but only that on exception and after argument the point was ruled in favor of the lien.

Where no reasons are given, I do not think in a case like that, or this, where many exceptions are filed and numerous points ruled, that such rulings should stand for precedents. Unless they come nearer to my own judgment than does this, I do not feel bound by them.

These claims are disallowed.

INSURANCE PREMIUMS.

Certain underwriters have filed claims for insurance premiums for which some notes had been taken—which are tendered back—and it is claimed these premiums are a lien by the maritime law. The objection that these notes are a waiver of the lien, or that the taking of Jones' note as trustee is such waiver, has already been disposed of in considering the question with reference to the supply liens. Such securities are not a waiver unless so intended, and there is no proof of such intention here.

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The question as to whether these premiums are a lien under the maritime law has not been decided by the Supreme Court and the rulings are not in accord in the other courts. In *The John T. Moore*, 9 Chicago Legal News, 417; S. C. 6 Central Law J. 261, Judge Woods decided against the lien, and there are perhaps other rulings the same way. But in *The Dolphin*,¹ 3 Cent. L. J. 628; S. C. 8 Chicago Leg. News, 401, Judge BROWN, of the Michigan district, decided that they were a lien, and his opinion was approved by Mr. Justice SWAYNE, the circuit justice of this circuit, on appeal,² 9 Chicago Legal News, 337. This is binding on me as authority, and I rule, therefore, in favor of the lien, and the claims will be so allowed.

THE MORTGAGE.

It appears that A. J. White & Co. were indorsers on the notes of the Packet Company, which had been discounted in bank, and being unable to renew, application was made to J. C. Neely and Louis Hanauer, who indorsed the renewed paper and took a mortgage to secure the indorsement on one of these boats for the amount of the note, which was \$5,000. They intervene by petition and claim a paramount lien. The mortgage was duly registered both under the act of Congress and the State registration laws. It does not appear for what special purpose the original money was lent to be used, but that it was used in the business of the company in running these boats may be admitted. If it be conceded that he who advances money to procure supplies would stand in the same attitude as the furnisher of supplies, and that it would be such a maritime contract as would support the jurisdiction of this court to foreclose the lien of the mortgage given to secure it by proceedings *in rem*, it would not apply to this

¹ Reported in 1 Flipp. C. C. R., p. 580.

² See 1 Flipp. C. C. R., p. 592.

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case. The original money was advanced by the bank on commercial paper, with A. J. White & Co. as indorsers. This debt was paid by proceeds of the loan secured on Neely & Hanauer's indorsement, and it would be carrying the doctrine very far to consider this last loan as an advance of money for necessary supplies. The money actually had for that purpose was paid, and I think this was not a maritime contract, and this court would have no jurisdiction to enforce it as such. It is only a common law mortgage, and it seems that the only right in this court such a mortgage has is to claim the *res* by award, as owner *sub modo*, or petition under the 43d Rule as against the proceeds of sale. *The John Jay*, (Bogart,) 17 How. 399; *The Angelique*, (*Schuchardt v. Babbidge*,) 19 How. 239; *The People's Ferry Co. v. Beers*, 20 How. 393; *The Lottawanna*, 20 Wall. 201, 222; S. C. 21 Id. 583. The rules of admiralty pleading should be strictly complied with. *McKinlay v. Morrish*, 21 How. 343, 347.

I think, therefore, the objection to this libel is well taken, but it should have been taken *in limine*, and the practice of allowing such objections to be taken to a pleading at the final hearing on exceptions to the report of the commissioners is intolerable, and I shall therefore now allow the mortgagees to convert, by amendment, their libel¹ into an answer and claim of the *res*, or into a petition under the 43d Rule, as they may elect. I think the act of Congress regulating mortgages is only a registry act and does not give the court jurisdiction to treat this mortgage as a maritime lien under maritime law. But it is a lien, which this court can enforce in the way above suggested.

PRIORITIES.

I am informed by the learned circuit judge of this circuit, that he has established the rule for this circuit, that liens for

¹ Mistake of counsel and court. It was a petition. [*Reporter.* •

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supplies under a State statute take precedence of mortgages like this, and rank in the same class and share *pro rata* with supply liens under the general maritime law. This is binding on us here, and the liens here allowed of that class will be first paid. See also *The Emma*, 3 Cent. L. J. 285; *The Alice Getty*;¹ *The Unadilla*;¹ *The St. Joseph*, 1 Brown's Ad. 202; *The Paragon*, 1 Ware, 322; 6 Am. L. R. 551; Id. 328; *The Theodore Perry*; *The Grace Greenwood*, 2 Biss. 131; *The Kate Hinchman*, 6 Biss. 367; *In re Scott*, 1 Abb. 336; *In re Harrison*, 2 Abb. 74 and note 83-93.

The authorities put liens for insurance premiums in the lowest class of maritime liens. I do not see, if they are maritime liens, why they should not take precedence of common law mortgages, except where they have become due on policies taken out since the date of the mortgage. In that case, being only for the benefit of the owner's interest and not being in any way beneficial to the mortgagee, I think they should not be allowed to displace the mortgage. All premiums on policies taken out prior to the mortgage will be first paid; all since will be postponed to it.

GENERAL CREDITORS.

I think the company cannot repudiate the Jones deed of trust, and that its provisions are a lien for the benefit of general creditors, which they may enforce under the 43d Rule. Only two I believe have filed such petitions. Ordinarily, I would not allow after the hearing any others to come in to their prejudice. But these only came in under that rule at the hearing, and I shall now allow all creditors to prove their claims as under one general petition. I do this because of the awkward practice adopted in this case of leaving questions of pleading to be determined at the hearing. This

¹ Reported in this volume.

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Jones deed of trust will inure to them as a lien against remnants. *The Edith*, 94 U. S. 518-523.

COSTS.

The creditors whose claims have been allowed as liens will be allowed their costs. Those whose claims have not been allowed will pay their own costs.

CIRCUIT COURT OF UNITED STATES,
Western Tennessee,

April 16, 1881.

Neely and Hanauer, the mortgagees, having appealed from the decree of the District, to the Circuit, Court, the same was heard this day by the Hon. John BAXTER, *Mr. Humes* appearing for the appellants and *Mr. Warinner* and *Mr. Jordan* for N. M. Jones, surviving partner, etc. The court "reverses the decree below in so far as it allows the demand of N. M. Jones, surviving partner, etc., to be paid in priority of the mortgage claims of the said J. C. Neely and L. Hanauer, when, in fact, the said N. M. Jones, surviving partner, etc., had waived said lien so far as said J. C. Neely and L. Hanauer, mortgage creditors, are concerned."

It will be noticed that Judge HAMMOND does not discuss one of the points made by counsel, which is that under the Tennessee boat act all liens stand on an equal footing, and as some of the articles or contracts for which a lien is given, are not maritime in their nature a difficulty of a serious character towards their enforcement or partial enforcement in an admiralty court was suggested. See the language of Judge TANEY in *The St. Lawrence*, 1 Black, pp. 530-531, with reference to the difficulties of enforcing State liens in admiralty. The principal point, however, on which the case was made to turn was, that a lien in the home port would be enforced if the contract was maritime, and if the State boat act covers it, irrespective of other considerations.

It will be remembered that counsel refers to *The Young Sam*, (cited as 20 Law Rep. p. 608, though it should be quoted as 10 Law Rep. N. S. 608.)

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Judge BROWN in *The General Burnside* (this vol., p. 144,) refers to the same case, and also to 2 Pars. on Shipping, 154, (which quotes that case) as authority for the doctrine that no necessity for credit in the home port need be shown, but that the lien is conferred by the State statute "whenever the supplies are furnished." Perhaps, this is the only one seemingly applicable

The Young Sam was decided twenty-five years ago, and will be found printed in full below. The curious reader, it is believed, will readily discover that the statement, quoted as law, is mere *dictum*.

It will be observed that the only question before the court was, whether under the statute of Maine, giving parties who furnish supplies towards the building of vessels a lien, included a vessel generally, or whether it alone covered the case of a vessel particularly named. The judge ruled that if the vessel were sought to be held under a given name, the lien would be enforced (according to several different rulings in that circuit,) but as the supplies were furnished to build a vessel not described by name, he would refuse to enforce it. Now that was all there was before the court or in the case. And the court's views on the first proposition have long since been repeatedly repudiated, upon the ground that supplies furnished towards the building of ships are, not maritime, but land contracts, and therefore are entitled to no lien under the State boat acts. *The Antelope*, 2 Ben. 405; *Foster v. Ellis*, 5 Ben. 83; *People's Ferry Co. v. Beers*, 20 How. 400; *Roach v. Chapman*, 22 How. 129; *Hardy v. The Ruggles*, 2 Hughes, 81; *Smith v. The Royal George*, 1 Woods, 294; and *Edwards v. Elliott*, 21 Wall. 532.

It is stated in *The Young Sam* that the lien exists by virtue of the State act alone, but does the principle of this *dictum* go far enough?

The essence of all liens lies in the necessity for credit—else why a lien? The party who buys material or incurs repairs or makes contracts under the State boat acts needs credit; otherwise he would pay cash. So that though under these acts it may not be necessary, when attempting to enforce such lien in a State Court, to show the necessity for credit, it is still presupposed or fully presumed. It is only in this sense that the *dictum* may be true. But when the attempt is made to enforce such contracts in the admiralty, the authorities seem to require that such necessity should be fully shown.

The leading case on this subject, *Taylor v. The Commonwealth*, 18 Am. Law Reg. 502, though reversed by MILLER, J., on appeal, appears on the matter of lien to have been approved by him. 14 Am. Law Reg. vol. 14, p. 84.

The first decree was by the learned judge of the Eastern District of Missouri, TREAT. It was ruled:

1st. "That while in foreign ports the presumption of necessity for relying upon the credit of the vessel for repairs, arises from the necessity of repairs to enable the vessel to prosecute the voyage; in home ports the

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presumption of a necessity for relying upon the credit of the vessel does not exist."

2d. "That in a foreign port the master, as performing the duties of that officer, has authority to bind the vessel and her owners for the necessary expenses of the boat; but in the home port he has not that right."

3d. "That while in a foreign port the necessary repairs are restricted to such as will enable the vessel to pursue her voyage with safety, the repairs in the home port, where they may be ordered by the owners, are not of such necessity restricted within such narrow limits."

4th. "Those, who in a home port, furnish repairs and supplies must show affirmatively, in order to have a lien on the vessel, that it was necessary to rely on the credit of the vessel; or, in other words, that the credit of the owners was not such as would justify a prudent man in furnishing repairs or supplies solely on their personal credit. Many persons in home ports have been accustomed, in consequence of the State boat acts, to suppose that repairs and supplies furnished there at the instance of the master gave a lien irrespective of all other considerations; but as they—so far as they trespass upon admiralty jurisdiction—are void, it is important that material men in home ports should bear in mind the distinction above stated, and the elements out of which a lien in a home port arises. If the owners are in good credit there is no necessity for relying upon the credit of the vessel, and consequently no lien is created."

This decision was made after the new 12th Rule, but before *The Lottawanna* decisions, and what adds force to it is the fact that both Judge TREAT and Justice MILLER believed at the time, under the new rule, that libels *in rem* for repairs, supplies, etc., could be filed in the home as well as in the foreign port. The reason given for the lien in the foreign port is that the owners have no credit, or no funds. And the presumption of want of credit is easily overturned if the owner is present or has an undoubted credit, as was the case in *The Sultana*, (*Pratt v. Reed*, 19 How. 359), where NELSON, Associate Justice Supreme Court, delivered the opinion. The same rule is laid down by CLIFFORD, J., in *The Lulu*, *The Kalorama* and *Gen'l Custer*, 10 Wall. 200.

We now come to *The Lottawanna*, 21 Wall. 558, where it clearly appears that "credit to the ship" has not been dispensed with under the new rule.

Says BRADLEY, J., "It is true the inconveniences arising from the often intricate and conflicting State laws creating such lien, induced this court in December term, 1858, to abrogate that portion of the 12th Admiralty Rule of 1844, which allowed proceedings *in rem* against domestic ships for repairs and supplies furnished in the home port, and to allow proceedings *in personam* only in such cases. But we have now restored the rule of 1844, or rather we have made it general in its terms, giving

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to material men, in all cases, their option to proceed either *in rem* or *in personam*. Of course, this modification of the rule cannot avail where no lien exists; but where one exists, no matter by what law, it removes all obstacles to a proceeding *in rem*, if credit is given to the vessel."

It will be seen from this extract that the general rules of admiralty were in the mind of the court, and especially of the judge (BRADLEY) who delivered the opinion. When he speaks of the failure of the party claiming a lien to record his privilege, and adds, "had the lien been perfected * * * the principles that have heretofore governed * * * would have undoubtedly authorized the material man to file a libel against the vessel or its proceeds," he must be understood to include the general admiralty rules.

In an able review of *The Lottawanna* decision (21 Wall. 558), see Am. Law Reg. vol. 14, p. 53, the following language is used: "It may be remarked, however, in passing, that the English and American law in denying the lien in question, (in the home port) violated no recognized principle of the general maritime law. It is conceded that a lien is not implied in all cases, even of supplies furnished to a foreign vessel. Now it may be argued as a legal inference, a *presumptio juris*, that supplies furnished to a vessel in her home port, where she cannot be in distress, where she is under no exigency of completing her voyage and getting home, are not necessities in any legal sense, and are furnished on the credit of the owner and not on that of the ship. This view of the subject reconciles the general principles of maritime law." The allusion to "credit of the owner himself and not that of the ship" shows that the writer understands Judge BRADLEY as upholding the foregoing construction of his language.

And Judge CLIFFORD, in 20 Wall. 219, thinking, as did Judges MILLER and TREAT, that the new rule put home and foreign ports on a like footing so far as filing libels by material men, maintained that the rule of credit being given to the ship still governed, in order to the creation of a lien.

The reasoning of the painstaking and learned district judge, who penned the opinion in this case, whether the reader assents to it or not, must be acknowledged to be both ingenious and able.

—In *The Dolphin*,¹ and note p. 592, something was said about the Continental law on the subject of unpaid premiums of marine insurance being a lien on the vessel. The following information has, since the publication of Vol. I been received relative to the law of different European States:

The law of Belgium, Art. 23, Code of Commerce, provides:

"L' assureur a un privilège sur la chose assurée. Ce privilège est dispensé de toute inscription. Il prend rang immédiatement apres celui des frais. Il n'existe quelque soit le mode de payement de la prime que pour une somme correspondant a deux annuités."

"The underwriter has a privilege on the thing assured. This privi-

11 Flippin, 580.

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lege (or lien) takes rank immediately after legal costs or expenses. Such preference, no matter how the premium is to be paid, exists only for an amount corresponding to two annual premiums."

The law of Portugal, for which the reporter is indebted to the U. S. consular agent at Oporto, is as follows: "The underwriter has a lien on vessels for unpaid premiums of insurance, if the policy, on account of which the premium is due, has not expired."

Through the courtesy of Chapman Coleman, esq., second Sec'y of the Legation U. S., at Berlin, the following statement of the German commercial law on the subject has been received. The same was furnished by Baron Judge DIEPENBROICK-GRUTER, President of the Senate of the Kammer Court (the highest tribunal in Prussia.)

"The German Commercial Law book (Hendelsgesetzbuch,) article 757, designates under ten heads the persons, who for certain claims, are entitled to the rights of creditors of a vessel (Schiffs-Gläubiger); *i. e.*, who have a lien against the vessel as against a third party. (Art. 758.) Assurers, as regards claims, do not belong to the category enumerated; nor is there any other provision of law which gives a lien of the character in question. As against a third party no such claim can therefore be enforced."

According to the law of Holland (letter received from D. Eckstein, esq., Consul at Amsterdam,) "there is no Dutch law giving underwriters a lien on vessels for unpaid premiums of insurance."

Christian Bors, esq., Consul of Sweden and Norway at New York, writes, "that, according to the laws of Sweden and Norway, underwriters have a lien on vessels for unpaid claims; certain other claims, such as seamen's wages, etc., have, however, preference."

From the U. S. Consulate (Henry B. Rydert, esq.,) at Copenhagen, the law of Denmark is ascertained to be:

"The underwriter has no more lien for unpaid premium on a vessel than any other person." "The insurer, or the party who insures for another party, is liable for the premium." "The premium is payable immediately on entering or signing an agreement for insurance. If the premium is not paid immediately the underwriter has the option of cancelling the agreement for the time the premium is unpaid, *provided* the policy has not been handed over with a clause that the same is in force, whether the premium is paid or not."

Sec. 285 of the Italian maritime law reads as follows:

"Privileged debts on vessels, their tackle, apparel and furniture are the following, (and the same are entitled to the priorities in which they are placed in this section.) * * * * *

"10. Premiums of insurance on a vessel, her tackle, apparel and furniture for the last voyage, or on a time policy, and for steamers navigating at stated periods and insured on time policies the premium corresponding to the last six months and the adjustment and contribution of mutual

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insurance associations during the previous six months, are liens on vessels as above."

The Austrian law follows the French law.

"Codice Commercio francese. Artic. 191.—Sono privilegiati i debiti indicati qui appresso secondo l'ordine in cui sono collocati.

"(1, 2, 3, 4, 5, 6, 7, 8, 9.)

"10. L'ammontare dei premi d'assicurazione fatta sul corpo, chiglia, attrezzi, arredi, e sull' armamento e corredo del bastimento dovuti per l'ultimo viaggio."

"The debts which follow are privileged (have a lien) according to the order in which they appear."

"10. The amount of the premium of insurance made on the hull, keel, rigging, furniture, apparel, outfit (or armament, *armamento*) and equipment."

The Spanish law, Sec. 598, of the Code of Commerce, reads as follows:

"Privileged liens on vessels, in their order, are the following: 1. Debts to the State. 2. Judicial expenses. 3. Tonnage, anchorage and port duties. 4. Expenses of keeping vessel in repair—sanctioned by the competent commercial court. 5. Wages of captain and crew. 6. Debts contracted during the last voyage to meet the exigencies of voyage and crew. 7. Debts for the construction of the vessel. 8. Debts for provisioning vessel. 10. Premiums of insurance. 11. Other liens and debts.

Para gozar de la preferencia que en su respectivo grado se marca á los creditos de que hace mencion el articulo 598, se han de justificar éstos en la forma siguiente: 1. Los creditos de la Real Hacienda * * *. 2. Las costas judiciales * * *. 3. Los derechos de toneladas, * * *. 4. Los salarios y gastos de conservacion del buque * * *. 5. Los empenós y sueldo del capitán y tripulacion * * *. 6. Los deudas contraidos para cubrir las urgencias de la nave durante el ultimo viaje * * *. 7. Los creditos procedentes de la construccion ó venta del buque * * *. 8. Los provisiones para el apresto * * *. 9. Los prestamos a la gruesa * * *. 10. Los prêmios de seguros, por las polizas y certificaciones de los corredores que intervinieron en ellos.

Though making endeavors in that regard the reporter was not able to procure satisfactory information as to what is the law, on this point, in Russia, Greece or Turkey.

THE YOUNG SAM.

CIRCUIT COURT—DISTRICT OF MAINE—APRIL TERM, 1857.

1. The party claiming a lien on vessels for materials, under Rev. Sts., ch. 125, sec. 35, must show that the contract under which the materials were furnished, had reference to some particular vessel, for the construction or repair whereof such materials were to be used.

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2. Whether any case can come within this statute, if the particular vessel has not been begun to be built before the sale of the materials, *quære*.

Butler, for the appellant.

Shepley, for the claimant.

CURTIS, J.—This is an appeal from a decree of the District Court, dismissing a libel filed in that court to assert a lien on a vessel for the price of materials used in its construction.

The material facts which I deduce from the proofs are, that in January, 1855, the claimant contracted in writing with one Edmund Merrill, for timber for the keel, shoe, floor timbers, naval timbers, foot-hooks and risers, sufficient for a ship of about 900 tons, and agreed to pay therefor by conveying to Merrill in fee a certain ship-yard and the buildings thereon. To enable himself to perform this contract, Merrill contracted with the libellant for the timber, for the price whereof the lien is claimed. This timber was put on to railroad cars by the libellant, consigned to the claimant at Portland, who obtained a delivery order from the railroad company, and directed the cars to be taken to Westbrook, and there received the timber, and used it in the construction of the vessel in question. It does not appear that when this timber was delivered, this vessel had been begun to be built. The inference from the fact that, among the timber were keel pieces, is, that the vessel was not then begun.

There is no evidence that the libellant and claimant ever met at all concerning the timber, save that the libellant was present when the timber was unladen, and assisted in unloading that and other timber from the railroad cars. It is not shown by the libellant that when he contracted to sell the timber to Merrill, he relied on any lien on this vessel, nor that he even knew it was intended for any particular vessel. He neither produces his book of accounts to show a charge to any vessel, nor offers any evidence of the terms of the contract between Merrill and himself. He relies solely on the facts that he was once the owner of the timber; that whatever contract he may have made with Merrill, he himself was present when the timber came into the actual possession of the claimant, and that it was used in building the vessel libelled.

The local law, (Rev. Sts. ch. 125, sec. 35,) gives to any person who shall furnish materials for or on account of any vessel, building, or standing on the stocks, or under repairs after being launched, a lien for the price of such materials.

But the materials must be furnished for or on account of some particular vessel, building or standing on the stocks, or undergoing repairs. It has been repeatedly held in this district, and I concur in the correctness

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of the decision, that the parties must have reference to some particular vessel in the construction or repairs whereof the materials are to be used, and upon which the lien is to be created. *The Calisto*, Davies' R. 29; S. C. on appeal, 1 Story's R. 244; *Sewall v. The Hull of a New Ship*, Ware's R. 565. I entertain great doubt whether any case can come within this law, if the particular vessel had not been begun to be built before the sale of the materials.

But it is not necessary to decide this point, because it is not shown by the libellant that his contract with Merrill had reference to any particular vessel, and I consider the burthen rests on him to prove this. It was urged at the argument, that in case of materials furnished for a foreign vessel, the admiralty law presumes they were furnished on the credit of the vessel. But in such a case it must first appear that there was a particular vessel in the contemplation of the parties whose necessities were to be supplied; and, according to the correct doctrine, as expounded by the Supreme Court at the last term, it must not only appear that the supplies were necessary for the particular vessel, but that it was also necessary that the master should have a credit to obtain them.

The liens given by the local law do not depend on the same requirements. But whatever requirements are made by the local law as prerequisites for a lien, must be shown by the libellant to have been complied with, before he can claim a preference over other creditors, or entitle himself to assert an interest in the property of a third person.

Whether one who agrees to sell materials for building or repairing a vessel, and who contracts with another for the means to enable him to comply with his agreement, can, thereby, give a lien to a sub-contractor, under this law, it is not necessary in this case to determine. As was suggested in *The Keersage*, (2 Curtis' R. 421,) the case of a sub-contractor for labor is not necessarily the same as that of a sub-contractor for materials. I mention it here, only to exclude the conclusion that anything is intended to be decided respecting this question.

The decree of the District Court is affirmed with costs.

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P. C. CALHOUN v. THE MEMPHIS & PADUCAH
RAILROAD COMPANY.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
APRIL 7, 1879.

1. RAILROADS—ACCRETIONS—MORTGAGES—WHAT ARE INCLUDED.—

Where a railroad company makes a general mortgage of the railroad this does not pass after-acquired lands, unless they are used in connection with the actual operations of the road as a part thereof.

2. The doctrine of accretions does not extend to such lands.

3. THE RULE AS TO AFTER-ACQUIRED LANDS.—If the intention is to include in the mortgage lands which the company expects to acquire, they should be described with reasonable certainty. They would not pass under a mortgage, where the property is described as "the railroad then constructed and to be constructed, etc., and all other corporate property, real and personal of said railroad company, belonging or appertaining to the said railroad, whether then owned or thereafter to be acquired."

The Paducah & Memphis Railroad Co. executed a mortgage, now foreclosed. The foreclosure was had in this cause, and grew out of a mortgage "on all the railroad of said company, as well that part then constructed and completed as the part thereof which should thereafter be constructed and completed; and all and singular the right of way of said company, and the lands, real estate, rails, tracks, bridges, buildings, depots, station houses, shops, warehouses, structures, erections, fixtures and appurtenances thereto belonging or in any wise appertaining, whether then owned and possessed, or thereafter to be acquired by it; and also all the locomotives, engines, tenders, cars, carriages, shop-tools and machinery, and all the franchises, rights and privileges, and all other corporate property, real and personal, of said railroad company,

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belonging or appertaining to said railroad, whether theretofore acquired and then held and owned, or thereafter to be acquired by said railroad company, including all depots, warehouses and structures, and all lands acquired or designed for depots, warehouses or structures, at either terminus or along the line of said railroad, whether then held and owned or thereafter to be acquired by said railroad company; and all continuations, branches, tracks or extensions of said railroad to such depots, warehouses and structures; and also all the right, title and interest which said Paducah & Memphis Railroad Company then had or might hereafter acquire under and by virtue of any lease to it in and to any other railroad branching from or connecting with the said railroad of the said railroad company hereinbefore described, or in and to any other property, real or personal, used or to be used by the said railroad company in connection with its said railroad, or with any railroad leased by it as aforesaid; and all and singular the tolls, incomes, earnings and profits of the said railroad, of said railroad company and of any railroad leased by it as aforesaid; and also all the estate, rights, title, interest, property, possession, claim and demand whatsoever, as well in law and equity, of the said railroad company, of, in and to the same, and every part and parcel thereof, with the appurtenances, to have and to hold," etc.

The railroad at a subsequent time acquired a tract of forty-four acres of land from one Kerr, and took his deed therefor, which land lay along and adjacent to the roadway. The consideration for this conveyance, as appears from the face of the deed, (together with two or more acres, before granted as right of way) was the location of a station at a place called Kerrville by said company. This land, the proof shows, was surveyed and laid off into town lots, and as such was offered for sale.

Fisher and others (who came into court by petition) hav-

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ing obtained judgments against the railroad company levied executions on these town lots, and claim that as they are not included in the mortgage they should be sold and the proceeds be applied to the payment of their judgments.

Metcalf & Walker, for petitioners.

Gantt & Patterson, for defendants.

HAMMOND, J.—It is insisted by the petitioners that the land in dispute is not within the description of the property conveyed, or if it can be so held, then, that the mortgage is inoperative because this land is not more particularly described, and was not then owned or in expectancy. However carefully we analyze the words and sentences used in describing the property conveyed, much may be said on either side, and there is no very clear indication either way, as to the actual intention of the parties in relation to land situated as this is and acquired as this was. It is not unusual for railroad companies to own lands not at all connected with the narrow strip occupied by the roadway and its appurtenances, and not unusual to include such lands in the mortgages. Neither can it be denied, that under a properly constructed instrument, lands of that character to be subsequently acquired may be included with the other property conveyed. But all mortgages of the kind, which have fallen under my observation, make some provision for utilizing the outside lands by their sale and the application of the proceeds to the purposes of the trust, generally to the construction or betterment of the road itself. The entire absence of any such provision in this mortgage, more than any other circumstance, inclines me to the belief that as a matter of fact, lands such as these were not in the contemplation of the parties. Besides, as to other property already included,

there is no ambiguity whatever, and it is only when we are called upon to say whether *this land* was conveyed by the instrument, that it becomes perplexing in its uncertainty of description; yet, the expression "all other, the corporate property, real and personal, of said railroad company, whether heretofore acquired and now held, or owned, or hereafter to be acquired by the said railroad company," and, perhaps, other phrases in the description are broad enough in terms to cover this land. It is doubtful if the words, "belonging or appertaining to the said *railroad*," as used in connection with this phrase, were intended to limit the general description to lands to be used in the railway, and appurtenant, as for depots, warehouses, structures, etc., because these had been already abundantly described with the description of the railway itself. The word "railroad," as used here, may mean *railroad company*, as it frequently does. Ordinarily, this general description would be controlled by the subsequent enumeration contained in the words "all depots, warehouses and structures." *Pullan v. C. & C. R. Co.*, 4 Biss. 35, 43; 3 Wash. Real Prop., 400, 431. But when this rule of construction is relied on, it will be generally found that the particulars are introduced with a *videlicet*, or some such manifestation of the intention to restrain the general description. Bouv. Dict. words "videlicet," "scilicet;" and this *ejusdem generis* rule of construction always yields to the intention to be gathered from the context and general scope of the whole instrument. *Williams v. Williams*, 10 Yerg. 76; *Edmonds v. Edmonds*, 1 Tenn. Ch. 163. Here the particulars are introduced by the word "including," which does not indicate a restrictive intention, but rather the contrary.

These particulars having been already more particularly described, may have been inserted out of abundant caution, and not for the purpose of confining the mortgage to the railway and its superstructure. The same uncertainty pre-

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vails if we consider the other terms of this description, supposed to include this land. But, notwithstanding this, the general description is broader than in *Dinmore v. R. & M. R. Co.*, 12 Wis. 649, or that in *Seymour v. C. & N. F. R. Co.*, 25 Barb. 284, and the case falls within the principle of these cases, and the case of *Shamokin Valley R. Co. v. Livermore*, 47 Penn. St. 465, all excluding lands situated like this, under mortgages very similar to the one under consideration. *Walsh v. Barton*, 24 Ohio St. 28; *Parrish v. Wheeler*, 22 N. Y. 494.

A mortgage by a railroad company does not, by implication, cover property not essential to its business. 1 Jones' Mort. 156. In this case, while all other property is described with marvelous detail, this, if intended to be conveyed, is only described by doubtful general terms. It does not seem, from other provisions and from the whole instrument, to have been within the scope of the contract the parties were making. This point would be sufficient to decide the case, but inasmuch as it may be doubted, I have considered it on the assumption that the intention of the parties was to convey all lands not immediately connected with the railway, and appurtenant to it, then owned and subsequently to be acquired.

Railroad mortgages have, on grounds of public policy, by a sort of *eminent domain*, somewhat trespassed upon some of the best assured doctrines of the common law; but the courts have not unconditionally surrendered to them all the principles which govern in determining the rights of property as between ordinary individuals. On the doctrine of accretion, it has been held that, without particular mention of the property afterwards acquired, a mortgage by a railroad company will pass, under a general description, property subsequently acquired which is essential to its use, and may be fairly taken as a part and parcel of the thing which

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we call a railroad. 1 Jones' Mort. §§ 152, 161. But as to its other property, not regarded as accretions to the road itself, these mortgages are governed by the same rules as in other cases. The broad doctrine stated in *Mitchell v. Winslow*, 2 Story, 630, has come to be taken as quite an accurate statement of the principle, that after-acquired property may be the subject of a sale or mortgage; but, in its application, the courts have established that the general principle not only has exceptions, but in all cases must conform to the rules governing all contracts. It is said that, in relation to the sale of things not yet in existence, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an *agreement* to sell—of an executory contract. Things not yet existing, which may be sold, are those which are said to have a potential existence—that is, things which are the natural product or expected increase of something already belonging to the owner. But he can only make a valid agreement to sell—not an actual sale—where the subject of the contract is something to be afterwards acquired. *Wyatt v. Watkins*, 1 Tenn. Leg. Rep. 148, 150; Benjamin on Sales, § 78; 2 Story's Eq. 1040, 1231; 1 Jones Mort., § 149; *Everman v. Robb*, 52 Miss. 654; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Looker v. Peckwell*, 38 N. J. L. 253; *Merrill v. Noyes*, 56 Me. 458; *Phila., W. & B. R. Co. v. Woelper*, 64 Pa. St. 356; *Ellett v. Butt*, 1 Woods, 214; *Ball v. White*, 94 U. S. 382.

In the application of this principle to railroad mortgages, it will be found that the courts sometimes refer them to one of these classes, and sometimes to the other, as the property is regarded as personal or real property. 1 Jones Mort., § 154, and cases cited; *Pennock v. Coe*, 23 How. 117; *White-water Valley Co. v. Vallette*, 21 How. 414, 422; *Dunham v. R. Co.*, 1 Wall. 254, 267, 268; *Shaw v. Bill*, 95 U. S.

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10; *Pullan v. C. & C. R. Co.*, 3 Biss. 35; [S. C. 5 Biss. 237 and notes;] *Phelps v. Murray*, 2 Tenn. Ch. R. 753. It is said in this last case that a contract relating to realty was always enforceable in equity, and therefore a conveyance of realty, not the present property of the vendor, is good in equity. And all these cases show that there never was any difficulty in treating a contract to convey real estate to be subsequently acquired, as a mortgage of it, in all cases where the object was to secure a debt. We have already seen that after-acquired lands, not used in connection with the railroad, cannot pass under a general mortgage of the road itself, as a part of it, on the principle of accessions to it; and hence it follows that, as to this kind of property, the contract must be treated as an agreement to mortgage; and under the rule that a court of equity will treat that as one which is agreed to be done, it constitutes a lien upon the land specifically mentioned. It was held in *Wilson v. Boyce*, 92 U. S. 320, that a statute creating a lien upon "the road and property of the company" took effect to include lands disconnected with the road. It was said that a deed "of all my estate," or of "all my lands wherever situated," passed title. 1 Jones Mort., § 65; *Reid v. Wilmington R. Co.*, 13 Wall. 264, 269. As to property already acquired, this description could be made certain by extraneous evidence, but it would be impossible by such a description, in conveying subsequently acquired lands, to designate them; and as against creditors the description must be reasonably certain, or it does not operate as notice. 1 Jones Mort., §§ 66, 528, and cases cited; *Seymour v. C. & N. F. R. Co.*, *supra*; *Dinsmore v. R. & M. R. Co.*, *supra*; *Shamokin Valley R. Co. v. Livermore*, *supra*. The principal of *Wilson v. Boyce* cannot be applied to lands not already owned at the time the deed was made, without wholly breaking down the rules of law which require

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the mortgagee to give notice by the mortgage of the property claimed under it. No case that I have found gives any support to the doctrine that a grantor may convey by that description alone "all the lands he may subsequently acquire," and thereby pass every parcel of land which may afterwards become his own. Parties may, as a security for their debt, mortgage unsurveyed lands by an agreement to purchase them, when not yet acquired, as in *Wright v. Shumway*, 1 Biss. 23, and other cases. And no doubt a railroad company might, by contract, agree that the mortgage should cover all lands which should be subscribed to it for stock, or to be granted to it by the government in aid of its construction, or the like description; but every such contract, if not designating by metes and bounds the lands to be acquired, should indicate with reasonable certainty the particular property, so that all persons would know what was intended to be conveyed. And I think, in such cases, the power to mortgage would be limited to such lands as the company, at the date of the instrument, had an expectation of obtaining, or to such lands as could be designated in the agreement itself, as those upon which it was to operate.

The result is that the prayer of the petitioners must be granted, and their judgment liens held paramount to the mortgage.

In *Jno. L. Sutherland*, trustee, *Lucien Birdseye*, trustee, and *Thos. N. McCarter*, trustee—three bills filed against *The Lake Superior Ship Canal Co. et al.*, decided at Detroit, March, 1874—Judge EMMONS lays down some important rules of practice in foreclosure cases, viz.:

PARTIES IN EQUITY NECESSARY.—Prior incumbrancers are necessary parties to a bill brought by a junior mortgagee against a mortgagee or his assignee in bankruptcy, if there are real doubts as to the amounts due or as to the property which their liens embrace.

DOUBTFUL INTEREST—SALES IN EQUITY.—Where any doubt exists as to its character and extent, a court of equity will not decree the sale of an interest capable of being reduced to a certainty.

FORECLOSURE OF MORTGAGE—PRACTICE.—If a subsequent incumbrancer is already brought before the court by a prior one, an original

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bill, subsequently brought by him to foreclose his mortgage, will not be entertained. In the first suit full relief may be had, with or without a cross-bill, according to circumstances.

INDEPENDENT SUITS.—Where property is in the hands of a receiver, parties having an interest, and more especially active parties, will not, without leave of the court, be permitted to enforce their rights by an original suit. If the relief may be had in the pending litigation, such leave will not be granted.

MORTGAGE TRUSTEE—SEPARATE SUIT BY.—A subsequent mortgage trustee appeared and submitted to a receiver of the estate, and resigned *pendente lite*. Without leave had his successor filed an original bill of foreclosure: *Held*, that it was both unwarranted and unnecessary.

MORTGAGED PREMISES—SALE.—Mortgaged premises may be sold free from incumbrances by a court of equity, remitting the lien holders to the proceeds at the suit of subsequent incumbrances or other parties having rights in the equity of redemption.

PRACTICE IN UNITED STATES COURTS WHERE POSSESSION OF PROPERTY IS IN STATE COURTS—POWER OF FEDERAL COURT TO ORDER INSTITUTION OF SUITS.—The decision in the case of *Marshall v. Knox*, 16 Wall. 551, construed. It is held that notwithstanding that decision, the Circuit Court has the power to order all matters pending therein to be adjudicated by an original suit where the property is in possession of the State Court by proceedings commenced before the bankruptcy; the suit in the Circuit Court to be subsequently brought by an assignee in bankruptcy.

BILL BY ASSIGNEE TO SELL MORTGAGED PROPERTY.—A bill will be entertained by the Circuit Court, brought by an assignee in bankruptcy, against several mortgagees and others who are lien holders, for the purpose of ascertaining the amounts due, and to sell the property free from all liens.

CROSS BILL—ITS OFFICE IN CHANCERY PLEADINGS.—If matters are germane and are connected with the subject of the litigation, they may be brought in by cross-bill. The matter introduced may be entirely new.

TRANSFER PENDENTE LITE.—It is only in cases where the complainant parts with his interest and where defendant's rights are transferred by death or by operation of law, as by bankruptcy or the insolvent laws, that a transfer *pendente lite* need be noticed by litigants in courts. [Reporter.]

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EX REL OF F. M. RAMSEY vs. JAILER OF WARREN
COUNTY.

DISTRICT COURT—DISTRICT OF KENTUCKY—MAY 10, 1879.

HABEAS CORPUS.

1. ARREST OF FEDERAL OFFICER BY STATE OFFICERS.—Where a Federal officer is arrested by the State authorities, on petition alleging that he is held in custody by the latter for an act done under authority of the United States, this court has no right to refuse the writ of *habeas corpus*, or to refuse to discharge him, if in the judgment of the court he merits a discharge.

2. JURISDICTION.—The court having jurisdiction, its decision is binding on the State Court and is beyond review, in the same manner and to the same extent as the decision of a State Court, having jurisdiction, is binding upon the Federal Court.

3. NOTICE TO THE STATE.—In cases of this kind, according to the practice which prevails in the District of Kentucky, notice is required to be given to those who represent the Commonwealth, but this is by no means essential; the Commonwealth not being a party.

The prisoner, while in discharge of his duty as deputy United States marshal, killed one Joseph Lightfoot, a citizen of Kentucky. For that he was arrested and held by the State officers. The other facts appear in the statements of counsel and in the opinion of the court.

G. C. Wharton, United States District Attorney, moved that the prisoner, before the court on a writ of *habeas corpus*, be discharged from the custody of the jailer of Warren county. He said that Ramsey had twice before been arrested for the same offense on writs from Warren county, and that he had been twice discharged from custody upon the ground, that what he did and what was alleged against him as a

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crime, was done in pursuance of a law of the United States and an order of a court thereof. He claimed that it was the right of the prisoner to have the judgment enforced.

T. E. Moss, Attorney General of Kentucky, was present, and moved that the prisoner be remanded to the State Court for trial. He asked that the case be heard anew with all the evidence. He said that the able counsel present on the former hearing was not an authorized officer of the State.

BALLARD, J.—When the writ was first issued in this case, according to the practice which has prevailed here, notice was required to be given to those who represented the Commonwealth, and counsel did appear to represent the Commonwealth. I did not know whether the attorney present was authorized to act for the Commonwealth, but I know that counsel was here representing the Commonwealth in the matter; that the case was fully heard, and that testimony was adduced on both sides; witnesses were summoned on behalf of the Commonwealth, and they were heard, and the prisoner was discharged; it being held by the court that what he did was done in pursuance of a law of the United States, and that he was justified in the act which he did.

Now, whether the decision of the court was right or wrong on the facts, the court has jurisdiction by the very terms of the act of Congress to issue the writ of *habeas corpus*. This court has jurisdiction if the prisoner is in the custody of the State, and he claims that he is in custody for an act done in pursuance of a law of the United States or any order of a court thereof. The case here is: The prisoner was discharged after a full hearing before this court. He was arrested again on a bench warrant, a writ of *habeas corpus* issued, and he was brought before this court again, and it being conceded that he was arrested on a bench warrant for

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the same matter, without a hearing the court discharged the prisoner. And now a third time the prisoner is here on a writ of *habeas corpus*. He was ordered into custody by the State Court, not by a bench warrant strictly; the prisoner being in court, was ordered into custody. It is now conceded that this is for the same matter for which this party was hitherto discharged. I again order him to be discharged. Now I repeat that there might be some question as to whether the decision of this court upon the facts of the case was right—that is, another mind might arrive at another conclusion, but I do not think it is likely. I do not think the State judge, for whom I have much respect, would have reached a different conclusion if he had heard the evidence which was before me. It was pretty well shown in the case that the party who was killed was a very violent man, extraordinarily violent; that he had declared that he would not submit to an arrest; that it would take more than any one officer to arrest him; that he was engaged at the time in an occupation connected with the making of sorghum sirup, with his pistol belted around his person, and that he had reason to know, and that all the circumstances pointed to the fact that he did know that the officer came there to arrest him and had in his possession the warrant for his arrest. He gave him no opportunity, it is true, to read any warrant to him, for he acted too promptly, and his conduct was such as to indicate resistance to the officer in the arrest, and not only resistance, but such resistance as to imperil the life of the officer and make it necessary for him to act as promptly as he did. Now I repeat these facts simply that the Attorney General, who is now present, and who was not present at the time, may understand not only the ground, but that there was at least some justification for the decision rendered. But I say that whether that decision was right or wrong, I do not think it can be denied that the court had jurisdiction,

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and having jurisdiction its decision should be respected. The State Court is as much bound by this decision as I would be bound by a decision in which the State Court had jurisdiction. I have no jurisdiction to review the judgment of a State Court, nor the State Court to review a judgment of this court. This case is somewhat similar to the case before Judge GRIER, reported in 2 Wallace, jr.'s, Reports. There a warrant in the first instance regularly issued by a justice of the peace of Pennsylvania, charging a marshal of the United States with assault and battery, with intent to kill a certain negro. Judge GRIER issued a writ of *habeas corpus* under the very act of Congress, under which this court has exercised jurisdiction in this case. Afterwards the negro brought his civil suit against the marshal and issued out a warrant of arrest, and he was arrested, and District Judge KANE, acting under authority of Judge GRIER's decision, discharged him. He was arrested afterwards for assault and battery, brought before KANE, and again discharged. In this case the man was first charged with malicious shooting. He was discharged by this court. Secondly, he was arrested on a charge of murder, after indictment found, and now he is arrested substantially on a bench warrant again, for identically the same offense, and, therefore, it is a much stronger case than the above case. Yet in this case the State court has, in violation of the order of this court, proceeded to commit the man. I do not know that the State Court has been properly informed of the action of this court, but if so, the arrest of this man is in disregard of its orders. No doubt the man was in lawful custody of the State Court, but the act of Congress was intended to relieve the officers of the United States from that lawful custody when put there for an act done under act of Congress, or in pursuance of any law of the United States. I think, although this question has not been very directly passed

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upon by the Supreme Court of the United States, it is plainly touched upon in the case of Coleman¹ against the State of Tennessee. There a party, a soldier of the United States during the war, killed a citizen of Tennessee, and the charge was murder. The judge of the United States Court issued his writ of *habeas corpus* and discharged him. He was subsequently tried in the State Court, and among the defenses made was the defense that he had been discharged by the United States Court; and there was another defense, that for anything done by him during the war he was not amenable to the State of Tennessee. Now, the case in the Supreme Court went off chiefly on the latter point, but they also stated substantially that the judgment of the United States Court discharging the prisoner, was also a defense.

Pending the appeal to that court (the Supreme Court of Tennessee;) the defendant was brought before the Circuit Court of the United States for the eastern district of Tennessee on a writ of *habeas corpus*, upon a petition stating that he was unlawfully restrained of his liberty, and imprisoned by the sheriff of Knox county upon the charge of murder, for which he had been indicted, tried and convicted, as already mentioned; and setting forth his previous conviction for the same offense by a court-martial, organized under the laws of the United States, substantially as in the plea to the indictment. The sheriff made a return to the writ that he held the defendant upon a *capias* from the Criminal Court for the offense of murder, and also upon an indictment for assisting a prisoner in making his escape from the jail.

The Circuit Court being of opinion that so far as the prisoner was held under the charge of murder, he was held in contravention of the Constitution and laws of the United States, ordered his release from custody upon that charge.

¹97 U. S., p. 509.

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His counsel soon afterwards presented a copy of this order to the Supreme Court of Tennessee, and moved that he be discharged. That court took the motion under advisement, and disposed of it, together with the appeal from the Criminal Court, holding in a carefully prepared opinion that the act of Congress of February 5, 1867, under which the writ of *habeas corpus* was issued, did not confer upon the Federal Court, or upon any of its judges, authority to interfere with the State Courts in the exercise of jurisdiction over offenses against the laws of the State, especially when, as in this case, the question raised by the pleadings was one which would enable the accused to have a revision of their action by the Supreme Court of the United States; and, therefore, that the order of the Circuit Court in directing the discharge of the defendant was a nullity. And upon the question of the conviction by the court-martial, it held that the conviction constituted no bar to the indictment in the State Court for the same offense, on the ground that the crime of murder committed by the defendant whilst a soldier in the military service, was not less an offense against the laws of the State, and punishable by its tribunals, because it was punishable by a court-martial under the laws of the United States.

Now I say that this case may well have gone off on the ground that this man being a soldier of the army of the United States was not amenable to the laws of Tennessee. This was the first ground, but they touched on the ground of the court-martial—for they say that if he was guilty of murder and amenable to the laws of Tennessee, he might be also amenable to the United States for the same offense, and that a conviction in the court-martial for that identical offense would be no defense in the State Court, if the State Court had jurisdiction of the offense. They, therefore, ordered the discharge of the prisoner from the custody of the State officer.

They say: "This conclusion renders it unnecessary to con-

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sider the question presented as to the effect to be given to the order of the Circuit Court of the United States directing the discharge of the defendant. It is sufficient to observe that by the act of Congress, of February 5, 1867, the several courts of the United States and its judges, in their respective jurisdictions, have, in addition to the authority previously conferred, power to grant writs of *habeas corpus* in all cases upon petition of any person restrained of his liberty in violation of the Constitution or any law of the United States, and if it appear, on the hearing had upon the return of the writ, that the petitioner is thus restrained, he must be forthwith discharged and set at liberty."

Now that is as much as the court could say upon a question which it was not necessary to decide. They discharged the prisoner upon the first point. Unless they had regarded the other question, as without difficulty, they would have omitted to say anything about it at all.

Now, it is something of an anomaly arising out of our dual government that the officers of one government may be investigated in another sovereignty than that to which they are officially responsible. The marshal of the United States is not to be considered exempt from the operation of the laws of the State because he is a marshal, and yet it would seem absolutely essential to the vindication of the authority of the United States that that government should have some power at least to protect its officers when they commit what are apparent offenses in the discharge of their duty. A great many anomalous cases arise and must arise, and one should exercise forbearance—one government to the other. For example, an officer of this court or an officer of the State has a prisoner in his custody; say the State officer has a prisoner under authority of a warrant issued from a State Court, and is bearing him to prison, and an officer of the United States has in his hands a warrant for the arrest of the State officer. Now, if he proceeds at once to execute that

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warrant, the prisoner goes at large, as he has no power to take him, and thus the enforcement of the laws of the United States might defeat the enforcement of the laws of the State. You might reverse the case exactly, and the enforcement of the State laws might in a similar manner defeat the enforcement of the laws of the United States. That ought not to be done. I am of the opinion that the State officer has no right to arrest the marshal who has a prisoner in his custody, nor the marshal a right to arrest the State officer in charge of a prisoner. They should exercise forbearance.

Nothing is more improper than that there should not be harmony between the Federal and State Courts, and I have certainly at all times manifested my respect for the decisions of the State Courts, because I have respect for them, and no citizen of the State desires more than I to see the criminal laws of the State properly enforced; but when a Federal officer comes before me saying that he is in custody for an act done under authority of the United States, I have no right to refuse the writ of *habeas corpus*, or to refuse to discharge him, if in my judgment he merits a discharge; and I think that, having jurisdiction, the decision of this court is binding upon the State Courts, and beyond review, just as binding as any decision of a State Court having jurisdiction is upon me.

Attorney General Moss then addressed the court, mainly upon two points: First, that the Commonwealth of Kentucky had not been represented in the previous discussions of the question; and, second, that the prisoner was not held upon the same charge, not even upon a warrant, but upon an order of the court, in which the prisoner was then present. He asked a rehearing of the case, and leave to be allowed to produce testimony for the Commonwealth.

The court observed that the proceeding was against a jailer, and that the Commonwealth was not a party, and

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although it was customary to notify the Commonwealth, such notice was by no means essential; that the county attorney had represented the jailer or sheriff; and that upon the matter of the order of court by which the prisoner was committed, it was not material whether it was a mere order or not, so that the commitment into custody was for the same matter. The prisoner was, therefore, ordered to be discharged.

RUMFORD CHEMICAL WORKS, TO USE, ETC., V.
FINNIE.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
MAY 13, 1879.

NEW TRIAL—AFFIDAVITS OF JURORS—COMPUTATION OF VERDICT.

1. Affidavits of jurors are not admissible to show the mode of computation adopted by the jury to be contrary to the law and the evidence.

2. SUIT FOR THE INFRINGEMENT OF A PATENT.—On motion for a new trial defendants offered affidavits of jurors to show the method of calculation adopted by the jury, with items of debit and credit as allowed in determining the verdict, to demonstrate that such verdict was contrary to the law as charged by the court, and unsupported by the evidence.

H. T. Ellett and Pierce & Dix for, and *Geo. Gantt and McKissick & Turley* against, the motion.

HAMMOND, J.—The jury having made a mistake in their figures, by which the verdict was rendered at one thousand dollars more than they really found, on information to the court and counsel and upon application of the jury, the mis-

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take was corrected by entering a *remittitur* as appears by the record. The plaintiffs waived any affidavits of the jurors to show that mistake and confess it. Nevertheless, the defendants offer to prove by the affidavits the mode of calculation adopted by them to reach the verdict, (the jury having preserved their figures) in order to show as a ground for a new trial that it was contrary to the evidence, and not authorized by the charge of the court. The Supreme Court of the United States, in *United States v. Reid*, 12 How. 361, 366, declined to lay down any rule on the subject, and I do not find that they have since considered it. It is certainly contrary to the English cases to admit these affidavits, and it is said that Tennessee is the only State where they are admitted. "Public policy forbids the introduction of jurors' affidavits to prove anything which may have transpired in the jury room whilst consulting upon their verdict. To allow verdicts to be overthrown by the evidence of jurors would open a door for tampering with the jury, and might lead to consequences, in their operation on judicial proceedings, of every mischievous and pernicious character. To guard against such consequences, it is better the door should be at once closed against the introduction of jurors as witnesses to overturn their verdict. By the ancient law and practice the affidavits of jurors might be received to impeach their verdict; but previous to our revolution, at least as early as 1770, the doctrine in England was distinctly ruled the other way, and has so stood ever since. It is admitted, notwithstanding a few adjudications to the contrary, that it is now well settled, both in England and, with the exception of Tennessee, perhaps in every State of the confederacy, that such affidavits cannot be received, and, we believe, upon correct reasoning. If it were otherwise, but few verdicts could stand. It would open the widest door for endless litigation, fraud and perjury, and is condemned by the clearest princi-

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ciples of justice and public policy." Graham and Waterman on New Trials, 1429, 1430.

It is probable that this court is not bound by the Tennessee practice on this subject, but I do not place the judgment on that ground. *R. R. Co. v. Horst*, 93 U. S. 291. I think the Tennessee cases, all taken together, go only to the extent of admitting affidavits of the jurors to show misconduct, such as casting lots or playing cards for their verdict; and not to the extent of attacking the judgment of the jury by showing it to be defective in the intellectual process employed in reaching the verdict. Caruthers' History of a Lawsuit, § 384; *Crawford v. The State*, 2 Yerg. 60; *Booby v. State*, 4 Id. 111; *Hudson v. State*, 9 Id. 407; *Bennet v. Baker*, 1 Id. 399; *Johnson v. Perry*, 2 Id. 570; *Harvey v. Jones*, 3 Id. 157; *Norris v. State*, Id. 333; *Saunders v. Fuller*, 4 Id. 518; *Fletcher v. State*, 6 Id. 256; *Cochran v. State*, 7 Id. 545; *Nelson v. State*, 10 Id. 518; *Luster v. State*, 11 Id. 170; *Lewis v. Moses*, 6 Coldw. 197; *Galvin v. State*, Id. 283; *R. R. Co. v. Pillow*, 9 Heisk. 253; *Wade v. Ordway*, 1 Baxt. 229; *Junnaway v. State*, 3 Id. 206. See, also, *Hall v. Robinson*, 25 Iowa, 91; *Henly v. Luce*, 31 Me, 246; *Little v. Larrabee*, 2 Id. and note; *Jackson v. Dickson*. 15 Johns. 309.

Motion overruled.

In re Ward & Co.

IN RE WARD & CO.

DISTRICT COURT—WESTERN DISTRICT OF TENNESSEE—JUNE,
1879.

IN BANKRUPTCY.

PARTNERSHIP—CONTRACT—LENDER TO RECEIVE INTEREST IN
PROPORTION TO PROFITS—PRESUMPTIONS OF LAW.

Beyond dispute a participation in the profits of a business is *prima facie* strong evidence of a partnership in it, but a loan to a person engaged in trade on condition that the lender shall receive a rate of interest in proportion to profits, or a share of the profits, does not of itself constitute the lender a partner, nor does a contract to remunerate a servant or agent of a person engaged in trade by a share of the profits, of itself, render such servant or agent liable as a partner.

On petition to charge Margaret Holst as a partner in the firm of J. C. Ward & Co., and to adjudicate her a bankrupt. She claims that the facts only show that she lent her money on a contract to receive one-fourth of the profits as interest on the loan. The creditors insist that she was a partner in fact, and certainly so as to creditors.

Vance & Anderson, for creditors.

Estes & Ellett, for defendant.

HAMMOND, J.—Partnership is a contract of two or more persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. 3 Kent, 24. There is no difficulty in the ordinary course of busi-

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ness with the case of an actual partner, who appears in his character of an ostensible partner. The question as to the persons on whom the responsibility of partner ought to attach in respect to third persons arises in the case of dormant partners who participate in the profits of the trade and conceal their names. They are equally liable, when discovered, as if their names had appeared in the firm, and although they were unknown to be partners at the time of the creation of the debt. 3 Kent, 31. A partnership *inter sese*—that is, in relation to the persons engaged as between each other—can commence only by the voluntary contract of the parties, expressed in their agreement, or implied from their dealings with each other and the outside world. 43 Mo. 391. But parties as to third persons, and sometimes even as between themselves, may become partners by the legal effect of their agreement, or of their acts and dealings, although they may not be aware of such legal effect, and may not believe themselves partners and may deny it. 31 Vt. 395.

It is urged by the creditors in this case that the simple fact that Mrs. Holst participated in the profits makes her, by operation of law a sharer in the losses and liable for debts, and that every one who has a share in the profits ought to bear his share of the losses. 1 Smith L. Cases, 381.

An agreement between persons to share in certain proportions of the profits of a business does not necessarily make them partners as to each other under circumstances which certainly do render them liable as such to third persons. 1 Ware, 452. The rule of law formerly prevailing, that participation in the net profits of a business made the participant liable absolutely to third persons as a partner, has certainly been greatly modified in England and in this country. 83 Penn. St. 290. We have been favored by learned counsel with arguments on both sides, based upon a reference to the

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authorities on this question. And our Supreme Court say that "it must be confessed that some of the discriminations, where profits are used as compensation for definite services, are very nice." 22 Wall. 119. And I may add in the language of Lord Eldon, that the distinctions are so thin that they have proved perplexing and unsatisfactory. 17 Ves. 403. Distinctions based on the difference between net and gross profits, whether the parties have a lien or only may look to the fund, whether entitled to an account, whether they share as principal owners or not, whether liable on the doctrine of agency, etc., have all been, I find, quite as useless to all other judges who have, in the conflict of cases, searched for the principle, as they are to us here now. 3 Kent, 25, note 1, and also same note on page 22 (bottom) 12th ed. It will be thus seen that the conflict of cases is so great that, in the absence of controlling authority, a court may support either view with the most respectable judicial opinion.

I find that the perplexity grows out of an attempt to gauge and measure by tests each case so as to determine by a rule, whether as a matter of law, the partnership exists irrespective of the fact itself; and the solution to be to treat the case as presenting to the court and the jury the question as one of fact, and this rule of the common law as one of evidence, more or less decisive according to the circumstances of each case and not of itself conclusive.

I adopt Judge DEADY's explanation of the rulings of the Supreme Court in *Berthold v. Goldsmith*, 24 How. 537, in his opinion in *In re Francis*, 1 Deady, 286, S. C. 7 N. B. R. 359, in a case very much like this, and agree with him that, the old rule of the common law that a participation in the profits is *ipso facto* conclusive of a partnership, is not the established rule of the Supreme Court of the United States. I doubt if it is or ever was the established rule in England.

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The conflict was as great there as here. It was modified, if not abrogated, by the House of Lords in the great case of *Hickman v. Cox*, 91 E. C. L. R. 523, in the year 1860, which established the rule that the participation of profits does not necessarily in all cases and under all circumstances establish a partnership, but is treated as evidence, more or less cogent, according to circumstances, of a partnership.

The English Parliament, about 1866, passed an act to cure the conflict and establish the above rule, and so did the Legislature of Pennsylvania about 1870. These acts declare what I believe to be the better principle supported by the best considered cases, namely: That a loan to a person engaged in trade that the lender shall receive a rate of interest in proportion to profits, or a share of the profits, shall not of itself constitute the lender a partner; nor shall a contract to remunerate a servant or agent of a person engaged in trade by a share of the profits of itself render such servant or agent liable as a partner. This is also the rule in Tennessee. 5 Sneed, 726; 12 Heisk. 615; 1 Baxter, 108. Read as to strength of presumption, 37 Conn. 266. But, notwithstanding these exceptions, we think the general rule remains beyond dispute, that participation in the profits of a business is *prima facie* strong evidence of a partnership in it.

There was a verdict for the creditors, and motion for a new trial overruled. [*Reporter.*]

The Peshtigo.

THE PESHTIGO.

DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—JUNE,
1879.

1. COLLISION—RECOVERY—LIEN UPON INSURANCE.—The owner of a vessel injured by a collision can only recover to the extent of the value of the offending ship and her freight immediately subsequent to the collision. He has no lien or claim upon the insurance received by the owner of such other vessel.

2. ABANDONMENT NOT NECESSARY.—Where actual total loss occurs, there is no need of formal abandonment to entitle the owners to the benefits of the limited liability act.

Libel *in personam*, by McMorraw and Fitzgerald, owners of the schooner St. Andrew, against one Dunham, owner of the schooner Peshtigo, to recover damages brought about by a collision of those vessels. Besides the usual allegations of ownership and negligence, the libel set forth that, at the time of the collision, the Peshtigo was insured in the Manhattan and Orient Mutual Insurance Companies; that by reason of such collision and the damage thereby occasioned to the Peshtigo, these companies had become, and were liable to pay to the respondent the full amount of their policies, and that libellants had a claim against said companies enforceable by garnishment. Writs of garnishment were sued out against the companies, to which they made returns, admitting liability under the policies, and announcing their willingness to pay whomsoever the court should order.

Respondent, Dunham, in his answer, set forth a plea to the effect that, from the effects of this collision, the Peshtigo was sunk, and with her cargo became a total loss. Moreover, that the collision and the injury therefrom were occa-

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signed wholly without his privity or knowledge. To this • plea exceptions were filed for insufficiency.

F. H. Canfield, for the libellant.

J. J. Speed, for the respondent.

BROWN, J.—The writs of garnishment in this case can only be supported upon the theory of a lien upon the amount of the policies. If the liability of the owner is limited to the value of the vessel and freight, irrespective of the insurance, there is no claim against him, and consequently nothing which will support the garnishment. Therefore, unless the lien of the libellant upon the vessel is transferred to the insurance money, this suit must fail.

At common law, and also by the civil law and the general law maritime, the owner of a vessel is liable for damages occasioned by the negligence of the master and crew to the full extent of the injury sustained. The ordinary rule of responsibility of the principal for 'the acts of his agent obtains here, as in every other case; but long before the earliest English act upon the subject, a limit to such liability grew up among the maritime nations of Europe. "The ancient laws of Oleron, Wisbury and the Hanse-Towns contain no provisions on this subject; nor is there any alteration of the rule of the civil law noticed by Roccus; but Vinus, an earlier author, states that by the law of Holland the owners are not chargeable beyond the value of the ship and the things that are in it." Maclachlan on Merchant Shipping, 110. This limit of liability was first incorporated in the law of England in the reign of George II., and in that of the United States in the year 1851; but the adjudications under it have not been numerous.

After a careful search for precedents, I have not been able

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to find a single case in England, and but one in America where the precise question here involved has been passed upon. The absence of English authority is probably due to the fact that, by the law of England, the liability of the owner is limited to the value of the offending ship immediately *before* the collision, that is, in her undamaged state, while by the American and Continental law, the measure of liability is determined by the value of the ship immediately *after* the collision. In the United States the only reported case upon this point is that of the *Norwich & New York Transportation Company*, 8 Ben. 312, in which the learned judge for the Eastern District of New York discusses the question at length, and comes to the conclusion that the owner is not liable in respect of the insurance moneys.

The Continental authorities are full and explicit to the same effect. Article 216 of the Code of Commerce following the Hanseatic ordinance of 1614, and the French ordinance of 1681, declares that "Every owner of a vessel is civilly responsible for the acts of the master in whatever relates to the vessel and the voyage. This responsibility ceases on the abandonment of the vessel and freight." Caumont discusses the question at length in his *Dictionary of Maritime Law*, page 31, title, "Abandonment." And his remarks are worthy of reproduction: Sec. 54. "When the owner has not seen fit to insure his vessel, it is sufficient that he abandon her with her freight, in order to free himself from responsibility for the engagements of the master. Nothing further is demanded. Now, if the owner has adjudged it prudent to effect an insurance, in consideration of a premium more or less in amount paid by him, it is evident that the lenders upon bottomry and shippers cannot deprive him of the fruits of a wise foresight, and receive the benefits of a contract to which they are strangers." Sec. 57. "It has, then, been very properly decided: 1. That the owner

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who, to free himself from loans contracted by the master in the course of the voyage, abandons the ship and freight, is not compelled to account to the lender beyond that for the proceeds of the insurance underwritten upon the ship. (Aix, February 8, 1832.) 2. That the proprietor of the ship who effects an abandonment to the shipper is not held as including the value of the insurance. (Rennes, August 12, 1822.)" Sec. 57. "How could the owner of the ship be held to include in his abandonment the amount of insurance he has taken the precaution to put upon the vessel? Is not this insurance the consideration of the premium he has paid? Can this be affected by his guaranty of obligations contracted by the master? Ought not the relations established by law between the owner of the ship and the lender or shipper to be maintained quite independent of the contracts of insurance which each of them may make?" See also Bedarride, (Code du Commerce, sec. 295,) "In the discussion which the *projet de loi* of 1841 called forth, certain courts, notably that of Aix, urged that the abandonment should include, besides the ship and freight, the amount of insurance which the owner had bargained for. This claim, which had already been made before the courts, was formally condemned."

So, too, Defresquet, in his pamphlet upon the law of collisions at sea, discussing the right of abandonment, observes: "We remark, in conclusion, that if an abandonment has been made of a ship sunk by collision, the owner is not obliged to abandon at the same time the amount of his insurance. This was proposed at one time, but rejected."

These authorities seem to me to announce a sound principle of law and to be fortified by unanswerable reasons. The liability of the owner is limited to the value of the ship and freight. That liability ought not to be extended by a contract of indemnity made by him with a third party; in other words, the right of the injured party to reimbursement

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ought not to be dependent upon the contingency of a contract to which he was not a party, and with which he has no concern. He loses nothing which he would not have lost if the insurance had not existed. The contract of insurance is personal in its nature, and is a mere special agreement with a party seeking to secure himself against apprehended loss on account of his interest in a particular subject matter, and not at all incidental to, or transferable with, the subject matter. *May on Ins.*, sec. 6.

The shipper has no lien upon it for the non-delivery of his cargo. *Clark v. Brown*, 7 La. Ann. 342. Nor can even the master or crew have recourse to it in case of the loss of the vessel. *Eymar v. Lawrence*, 8 La. 42. See also *Thayer v. Goodale*, 4 La. 222; *Steele v. Ins. Co.*, 17 Pa. 290; *White v. Browne*, 2 Cush. 412; *Stillwell v. Staples*, 19 N. Y. 401.

Further objection is made to the plea in this case, upon the ground that the owner has not taken the appropriate proceedings under section 4284, and transferred his interest in the vessel and freight for the benefit of the libellants to a trustee as required by section 4285. It is a sufficient answer to this to say that the plea sets forth a total loss of the vessel and cargo from which would also follow a total loss of freight, and that no formal abandonment is necessary in such cases. 2 Pars. on Mar. Ins. 107, 111, 120; *Brown v. Wilkinson*, 15 M. & W. 391.

Exceptions to the plea overruled.

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HENRY RAWLE v. JOHN PHELPS.

CIRCUIT COURT—EASTERN DISTRICT OF MICHIGAN—JUNE 16,
1879.

A cause cannot be removed to the Federal Court under the act of 1875 unless the citizenship, required by the act, existed at the time of the commencement of the suit in the State Court.

On motion to remand to the Circuit Court for the county of Macomb.

The suit was begun in the State Court November 8, 1878; and the petition for removal, under the act of 1875, was filed February 11, 1879. When the suit was commenced, it appears that both parties were citizens of Michigan, but the petition for removal and the affidavits made in opposition to his motion showed that the defendant became a citizen of Wisconsin between these two dates. The question was, whether, under the act of 1875, the parties must be citizens of different States at the commencement of suit.

Stanley, for the complainant.

Phelps, for the defendant.

BROWN, J.—So far as cases originating in the Federal Courts are concerned, it is perfectly well settled that the requisite citizenship must exist at the commencement of the suit, and that the subsequent removal of the non-resident party to the State where the suit is pending, will not oust the jurisdiction. *Morgan's Heirs v. Morgan*, 2 Wheat. 290; *Mollan v. Torrance*, 9 do. 537; and in *Dunn v. Clark*, 8 Pet. 1, this rule was carried so far as to sustain a bill to en-

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join a judgment against a resident trustee under the will of a non-resident plaintiff. See, also, *Clarke v. Matthewson*, 12 Pet. 164.

Such being the general policy of the law, it would seem, by parity of reasoning, that where both parties are citizens of the same State at the time the suit is commenced, the subsequent removal of one of them to another jurisdiction, ought not to change the status of the case, or confer a right of transfer to the Federal Court; at least, such construction ought not to be given, unless the words of the statute are clear and explicit. A reversal of a policy adopted at the formation of the government and continued for seventy-five years, ought not to be inferred from doubtful or ambiguous words. The observations of Mr. Justice MILLER in *Johnson v. Monell*, 1 Wool. 390, 394, are pertinent here: "This is such a wide departure from the restrictions by which Congress had heretofore guarded the right of removal, and the proposition that a party instituting the litigation in a State Court, and pressing it to the point here mentioned, can, by his own voluntary change of residence, acquire a right to remove the case from the forum of his own selection, is so startling, that nothing short of the clearest evidence that Congress had both the power and the intention to grant such a right, will justify this procedure."

Under the act of 1879 it was held, in *The Insurance Co. v. Peckner*, 95 U. S. 183, that the petition for removal must show affirmatively that the plaintiff was a citizen of another State *at the time the suit was commenced*. It is true the court decided the question upon a technical construction of the statute, and did not undertake to state what its opinion would be under the subsequent acts, and the case is therefore not a controlling authority here. But a careful examination of the language of the two acts satisfies me that there is no substantial difference between them. The act of 1789 pro-

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vided that "if a suit be commenced * * * by a citizen of the State in which the suit is brought, against a citizen of another State * * * and the defendant shall, at the time of entering his appearance in such State Court, file a petition, etc." The act of 1875 provides that "any suit, etc., now pending or hereafter *brought* in any State Court, where the matter in dispute *exceeds* * * * the sum of \$500 and * * * in which there *shall be a controversy* between citizens of different States, etc., either party may remove." There is certainly no distinction between the words "commenced" and "brought." The use of the word "exceeds" in the present tense, obviously refers to the time the action is brought. The words "shall be a controversy" are somewhat equivocal, but I think they should be regarded as controlled by the previous word "exceeds" and should be construed in connection with it. There would be no reason for holding that the jurisdictional test as to amount should be applied to the time when the suit is begun, and the test as to citizenship to a subsequent time. The fact that the statute of 1875, as well as those of 1866 and 1867, extends the time within which the petition may be filed, proves nothing as to the time when the requisite citizenship should exist. If it did then the Supreme Court should have decided in the Pechner case that it was sufficient if the petition showed the defendant to be a non-resident corporation, *at the time of entering its appearance in the State Court.*

For these reasons it seems to me quite clear that the act was never intended to give a party the right of ousting the jurisdiction of a State Court, which has once lawfully attached, by removing to another State. It would practically put it in the power of either party to any suit in a State Court involving over \$500, to transfer his case to the Federal Court, by acquiring a residence in another State pending the litigation.

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My attention has not been called to any case under this act arising in the Federal Court, where the exact question has been determined, though it would appear by the syllabus of a case in the Central Law Journal, vol. 7, p. 398, that the Supreme Court Commission of Ohio have expressed views adverse to the position here taken.

In *The Indianapolis Railway Co. v. Risley*, 50 Ind. 60, the Supreme Court of that State held that there was no difference in regard to the time when the requisite citizenship must exist, between the act of 1789 and those of 1866-7, under which it was held that the petition must aver that the parties were citizens of different States at the time the suit was begun. The act of 1867 is like that of 1875 except in the use of the words "in which *there is* a controversy," instead of "in which *there shall be* a controversy." As before observed, I think this difference quite immaterial. A like ruling to that in Indiana was made by the Supreme Court of Massachusetts in *Tapley v. Martin*, 116 Mass. 275.

I do not regard the decision in the case of *Johnson v. Monell*, 1 Wool. 390, as necessarily inconsistent with these authorities. In that case the petition for removal set forth that the plaintiff was a citizen of Iowa when the suit was brought in the State Court; that he became a citizen of Nebraska, of which the defendant was also a citizen, while the suit was pending, and was so when it was tried, and that after this, by a voluntary change of residence, he became, and at the time he made his application for the transfer of his case to the Federal Court, was again a citizen of the State of Iowa. The petition for removal was made after the case had been tried in the State Court and a new trial granted. While the reasons given for sustaining the jurisdiction of the Federal Court are undoubtedly in conflict with the views here expressed, the order denying the motion to remand might well have been sustained by the fact that

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at the time the suit was originally commenced in the State Court, the plaintiff and defendant were citizens of different States. The plaintiff might have begun his suit originally in the Federal Court, and under all the authorities his subsequent removal to the State where it was pending would not have ousted the jurisdiction. This being so I see no reason why, if he had been a citizen of another State when the suit was begun in the State Court, he might not have removed it to the Federal Court, even though at the time of his petition for removal he was a citizen of the State where the suit was pending. The case of *McGinity v. White*, 3 Dill. 350, is nearer in point. In that case the suit was begun February 28, 1870, in a State Court of Nebraska, both parties being citizens of the State and the amount involved being less than \$500. The petition was under the act of 1866, and it appeared that pending the suit in the State Court, the defendant had in good faith become a resident of the State of New Jersey, and that owing to the long delay the interest on the amount originally involved had increased the amount then in controversy to over \$500. Judge DILLON sustained the removal upon the authority of *Johnson v. Monell*, confessing doubts respecting the soundness of the view, but adopting it because it seemed equally consistent with the language of the act, and more consistent with the reason and purpose of it than the opposite conclusion. In my opinion the right of removal under such circumstances ought not only to be consistent with the language of the act, but the language ought not to leave the right open to serious doubt.

The case will therefore be remanded to the Circuit Court for the county of Macomb.

In the Circuit Court of the United States at Memphis, Aug. 22, 1881, HAMMOND, J., decided an important question on motion to remand. The case was that of *Wooldridge v. McKenna*. Wooldridge, as assignee of

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McKenna, a bankrupt, brought suit in the State Court to set aside certain conveyances of real estate, on the ground that they were fraudulent. To that bill he made McKenna, and his daughter, Maud B. McKenna (citizens of Shelby county, as he alleged) parties. Whereupon, McKenna, the father, as next friend of the daughter, Maud B., petitioned for removal of said cause into the Federal Court in the name of said Maud B. McKenna, by himself as next friend, etc., alleging that said Maud B. was a citizen of Kentucky, etc. Judge HAMMOND rules that a father cannot by merely depositing his child in this or that State continue to change its domicil for any purpose without changing his own. He must relinquish and abandon his rights in that behalf to the child itself or another, or by operation of law the child's domicil will shift only with his own. As the affidavit in this particular case showed only that the father, a citizen of Tennessee, had placed his child to reside with friends in Kentucky, (permanently as he supposed) it does not follow that he may not change that intention and resume parental control, or that these friends may not compel him so to do by sending back the child to him. * * * As long as he exercises his legal control *qua* father, or has the right to do so, his child's domicil must be his own. The order declares that as Maud B. McKenna (the daughter) is a citizen of Tennessee, for that as well as other reasons of record, the cause must be remanded. [Reporter.

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THOMAS GREEN vs. TOWN OF DYERSBURG.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
JULY 5, 1879.

1. MUNICIPAL BONDS—RAILROAD SUBSCRIPTION.—Where a town is authorized by statute to subscribe to the capital stock of a railroad company and is required to pay the subscription in "not exceeding" six annual installments, and is further authorized to anticipate the collection of taxes by issuing "short bonds" bearing six per cent. interest: *Held*, that the proper construction of the act requires the bonds to mature at a date not longer than the assessments of taxes are due and payable; and that bonds payable in ten years and bearing seven per cent. interest are unauthorized by the act. These requirements are not directory only, but imperative, and must be complied with by the town. The bonds on their face show non-compliance with the statute, and there can be no *bona fide* holder for value of such bonds.

2. SAME—ARTICLE 2, SECTION 29, CONSTITUTION OF TENNESSEE.—Neither article 2, section 29 of the Constitution of Tennessee of 1870, nor the act of January 23, 1871, chapter 50, code 491a passed to enforce it, confers any power upon municipal corporations to issue bonds in payment of a stock subscription to railroads. The only effect of that act is to require a three-fourths vote of the citizens of the town as a pre-requisite, and to designate the County Court or the board of mayor and aldermen as the agents to execute whatever powers exist in the particular case. The powers must be found elsewhere in the statutes. Nor does the first clause of the second sub-section of the act confer any power to issue bonds under the second clause of the sub-section relating to stock subscriptions, even if the first clause can be held to authorize in itself bonds to be issued, when "credit is given or loaned" in aid of a railroad. Giving or lending credit, and subscribing stock, are essentially different.

3. SAME—ACT OF 1842, CHAPTER 117, CODE 1142 ET SEQ.—This act, as modified by the Constitution and subsequent legislation, is the general law under which all corporations must act in subscribing stock to railroads. It confers no express power to issue bonds in payment of the subscriptions, and unless such power is conferred by some other enactment no corporation can issue bonds in payment of a subscription to capital stock, but must pursue the requirements of this act. There is no statute conferring any express power on the town of Dyersburg to pay its

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subscription to the Paducah & Memphis Railroad Company's capital stock in ten years' bonds, bearing seven per cent. interest, and none can be implied from the authority conferred upon it by this act and its amendments.

4. **SAME—IMPLIED POWER TO ISSUE BONDS.**—There is no implied power in a municipal corporation to issue negotiable bonds in payment of a debt which it is authorized to contract. No decision of the Supreme Court of the United States or of the Supreme Court of Tennessee has so adjudicated; and, in the absence of any controlling decision to that effect, this court holds that the power must be expressly conferred, or necessarily implied, from some power given other than the bare authority to contract a debt for a particular purpose, whether it be a corporate purpose or not. Public safety requires that the implications in favor of such power shall not be extended beyond the point to which they have already gone. *Bona fide* holders will be protected against the irregular exercise of granted authority, but the authority itself should not be created by judicial decree upon unnecessary implication.

5. **SAME—CONDITIONS PRECEDENT.**—Where a bond upon its face promises to pay a sum of money to a railroad company "upon the express condition, however, that said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court house in said town," it is a condition precedent to the payment of the money, and not a mere covenant of the railroad company to so construct the road, for the breach of which compensation in damages is the remedy. No holder of the coupons can recover on them without showing either the performance or a readiness to perform the condition. The bond itself charges the purchaser with notice of the condition, and it is he that trusts the railroad company, and not the town.

6. **SAME—RULES OF CONSTRUCTION.**—It is a universal rule of construction of such instruments that the actual intention of the parties will prevail over that reached by any technical rules prescribed for ascertaining the intention. And, therefore, neither the rule that, if part of the money be payable before the covenant on the other side is to be performed; nor the other rule that, if the promisor has received part of the consideration, the covenants shall be held to be independent of each other, will override the intention manifested by the contract that the railroad should be built before the money can be demanded. These rules have always yielded to a clear manifestation of a different intention. The rule as to payment by installment does not apply to installments of interest, but only where the principal is so payable. The rule as to part performance does not apply where the part unperformed is the essential consideration.

7. **SAME—REASONABLE TIME.**—If no time be specified for the performance of the condition to construct the road, the law implies a reasonable time. And, when the amendment to the charter of the company of Jan-

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uary 27, 1870, chapter 49, section 5, required the road to be completed within seven years from that date, this will be taken as the time within which the condition should be performed, the bonds being dated on the 10th of May, 1873, and subsequent to the amendment.

On the 21st day of March, 1878, in the United States Circuit Court at Memphis suit was brought upon past-due coupons of bonds, issued by the town of Dyersburg, of which the following are samples, both of the bonds and coupons:

(COUPON \$8.75.)

The Mayor and Aldermen of Dyersburg, Tenn., will pay the bearer on the 10th day of Nov., 1878, eight dollars and seventy-five cents, being the semi-annual interest due on Paducah & Memphis Railroad bond No. 9654.

C. P. CLARK, *Mayor*.

W. C. DOYLE, *Recorder*.

(BOND No. 9654.)

((\$250.00.)

The Mayor and Aldermen of the town of Dyersburg, in the State of Tennessee, a corporation duly chartered by act of the General Assembly of the State of Tennessee, by the qualified voters of said town, under the provisions of an act of the Legislature empowering them so to do, by this bond promise to pay to the holder hereof, ten years after the date hereof, the sum of two hundred and fifty dollars, with interest at seven per centum per annum from this date, payable semi-annually at the city hall in Dyersburg, on presentation of the coupons hereto attached, to aid in the construction of the Paducah & Memphis Railroad; upon the express condition, however, that the said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court house in said town.

In testimony whereof, etc., this the 10th day of May, 1873.

[SEAL.]

C. P. CLARK, *Mayor*.

W. C. DOYLE, *Recorder*.

The defendant corporation filed six pleas to the declaration:

1. The first plea sets out the application of the railroad company for a subscription of \$50,000 to its capital stock to be paid in ten-year coupon bonds, at seven per cent. interest, to aid in the construction of the road through Dyer county; the passage of an ordinance submitting the proposition to

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the voters of the town to subscribe and pay for the stock upon certain conditions, among others the following: "The above subscription is made on the condition that the Paducah & Memphis Railroad is to be located and built to Dyersburg, and a depot of said road to be located within one-half mile of the court house without which condition accepted by the said railroad company, this subscription to be void and no bonds shall be issued; and this condition shall be written or printed if deemed necessary, by the Mayor on the face of said bonds. The acceptance, by the officers of said railroad company of any portion of the bonds herein authorized to be issued shall bind said company fully to the terms and conditions of said subscription, as set forth in all the sections of this ordinance; the ratification of this proposition, by the voters at an election; the passage of an ordinance authorizing the Mayor to subscribe for the stock upon the condition imposed by the ordinance; the application to the company to subscribe on the terms and conditions mentioned; the acceptance by it of the proposition and the spreading on the minutes of the railroad company of the proceedings of the board of Mayor and Aldermen of the town at the time of this acceptance." The plea then avers that the conditions upon which the town was authorized to become a stockholder, have never been complied with by the railroad company, without which the defendant corporation had no authority to issue the bonds, and the coupons sued on are not its act and deed.

2. The second plea is a simple plea of *non est factum*.

3. The third plea, after setting out the same facts as those stated in the first plea, avers that the bonds had printed on their face, the said condition, in the following words, to-wit: "*upon the express condition, however, that said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot located within half a mile of the court house*

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in said town;" that there was no other or different authority to issue the bonds, and no other or different consideration than that set out in the plea; that the bonds were delivered to the plaintiff or his assignors by the railroad company without the knowledge of or consent of the defendant corporation and without any authority from it; that at the time of said delivery, the company had not built its road to Dyersburg, nor located a depot within half a mile of the court house, nor has it at any time since done so, of all which the plaintiff had notice; that the coupons sued on are the coupons of the said bonds and none other; that the stock of the company had become worthless and the corporation dissolved by the foreclosure of a mortgage made by it, and on the purchase of its property and franchises by a new company; and therefore that the consideration had wholly failed, of which plaintiff had notice.

4. The fourth plea craves oyer of the coupons and bonds and sets them out *in hæc verba*, and then avers that the defendant corporation had never been authorized by any law of the General Assembly of the State of Tennessee, nor by any election of the qualified voters of the town to lend its aid to said railroad company by the issuance of the bonds aforesaid, as required by the 29th section of Article II. of the constitution of the State, of which plaintiff had notice.

5. The fifth plea craves oyer and sets out the bonds and coupons, and avers that the whole series of \$50,000 bonds was delivered to the railroad company on the express condition that they were not to be negotiated, nor to become due and payable, except upon the express condition that the railroad should be constructed to the town of Dyersburg and a depot located within half a mile of the court house, and avers that this never has been done.

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6. The sixth plea avers that the defendant corporation did not undertake and promise in manner and form, etc.; to which plaintiff has joined issue.

The plaintiff demurs to the first five pleas, and assigns the following grounds:

1. To the first plea, that the conditions mentioned, that the railroad should be built to Dyersburg, and its depot located within half a mile of the court house, were not conditions the execution or performance of which were precedent to the issuance of the bonds, nor to the liability of the defendant on them, but only a condition that the company should accept the terms of the subscription by agreeing to build the road to the town and locate the depot within half a mile of the court house.

2. To the second plea, that being a plea of *non est factum* it is not sworn to.

3. To the third plea: *First*, The same ground of demurrer as that taken to the first plea, as above stated, viz., that the plea shows that the company accepted the terms of the subscription which was the only condition precedent to the issuance of the bonds as shown by the plea; *Second*, That the plea is double in pleading a want of compliance with an alleged condition precedent, and at the same time a failure of consideration; *Third*, That on the averments of the plea itself the plaintiff is shown to be an innocent purchaser for value without notice.

4. To the fourth plea: That on the face of the plea it is shown that an election was held, and that the Legislature of Tennessee had by law authorized the bonds to be issued.

5. To the fifth plea: That it appears by the plea that the plaintiff was an innocent purchaser for value without notice.

The charter of the railroad company authorizes corporations, cities and counties to subscribe stock, but contains no authority for municipal corporations to issue bonds unless it

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is implied from the power to subscribe. Chap. 42, § 30, Acts. 1858, p. 79. The general railroad subscription laws, authorizing all counties and incorporated towns to subscribe for stock, contains no express power to issue bonds in payment of such subscriptions, but requires the levy of a tax to meet the installments of subscription, as made, and directs the tax collector, as fast as he makes collections, to pay the amounts over to the company. And to meet unexpected contingencies, the corporation may anticipate the collection of the railroad tax by issuing warrants bearing six per cent. interest, payable at such times as may be desired by the railroad company, the warrants to be received in payment of the stock. Thomp. & Steg. Code, §§ 1142-1165. By an act of March 13, 1868, Ch. 72, S. 4, § 1148 of the code was amended by adding to it the words "and shall issue the bonds when called for;" and by an act (found among the private acts) of December 9, 1868, Ch. 11, S. 26, said § 1148 was subsequently and further amended by omitting the words "and shall issue the bonds when called for," thereby leaving the section as it was before the amendment of March 13, 1866, except as to matter not pertinent here. By Section 29, Art. II. of the Constitution of 1870, which went into effect May 5 of that year, it is ordained that "the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election and the assent of a like majority." The act of January 23, 1871, entitled "An Act to Enforce Section 29, Article II. of the Constitution," Ch. 30, Thomp. & Steg. Code 491a, enacts that the counties and incorporated

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towns in the State may impose taxes for county and corporate purposes upon the conditions named therein, one of which is—"Second: The credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except, first, upon the consent of a majority of * * * the board of mayor and aldermen * * * of such city or town, and upon an election afterwards held by the qualified voters of said * * * city or town, and the assent of three-fourths of the votes cast at said election; * * * and if the assent of three-fourths of the voters of such * * * city or town is had, then the * * * board of mayor and aldermen * * * shall have full power to make and execute all necessary orders, bonds, and payments in order to carry out such loan or credit voted for as prescribed in this act; nor shall any county, city or town become a stockholder with others in any company, association or corporation, except upon a like election and the assent of a like majority as prescribed in this act."

By the act of February 26, 1869, Chap. 59, § 20, it was enacted "That it shall be lawful for the town of Dyersburg to make a corporate subscription to the capital stock of the Mississippi River Railroad Company (afterwards the Paducah & Memphis Railroad Company) not to exceed fifty thousand dollars in amount, payable in not exceeding four years, by annual assessments levied by the board of trustees of said town, and collected as other moneys are, and bonds of the town may be issued in anticipation of such collections, collected for town purposes," with a proviso that there shall be a previous election, and the subscriptions authorized by a majority vote.

By the act of February 8, 1870, Chap. 55, § 18, relating to the subscription of Haywood and Dyer counties to the Brownsville & Ohio, and to the Mississippi River Railroad companies, it was enacted "That stock which had been sub-

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scribed, or may hereafter be subscribed by any county, city or incorporation to said railroad companies, may be payable in *six* annual payments; and it shall be lawful for county courts and the corporate authorities of any city or town, making such subscription, to issue short bonds, bearing interest at the rate of six per centum per annum, to said railroad companies in anticipation of the collection of annual levies, if thereby the construction of the roads can be facilitated."

By the act of December 16, 1871, Chap. 122, where an election previously held, had authorized a subscription to the capital stock by as much as three-fourths of the qualified voters, so that the election would be within the constitutional requirement as to the number of votes to authorize a subscription, "such subscription shall be deemed a valid and legal subscription," notwithstanding the same was in excess of the amount authorized by the code, §§ 1142 *et seq.*; this act also allowed a new vote to be taken in case of doubt. And by the act of December 15, 1871, Chap. 129, these sections of the code were still further repealed and modified as to the restrictions on the amount of subscriptions authorized, but neither of these acts authorize in terms any bonds to be issued.

The averments in the pleadings do not show that anything was done under the special act of February 20, 1869, Chap. 59, § 20, but it is stated in argument and does appear by the record of the proceedings of the town, which is referred to in the pleas, that on the 12th day of September, 1871, an election was held authorizing a subscription to this railroad company of \$50,000, which "was held" to be illegal because excessive in amount; but it does not appear by said record of town proceedings that the subscription voted on that day was to be paid in bonds. This appears to be the fact, however, as to the election of July 5, 1872, on the result of which these bonds were in fact issued.

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Humes & Poston, and J. P. Meux, for plaintiff.

Harris, McKisick & Turley, for defendant.

HAMMOND, J.—Some of the grounds of this demurrer, as stated, are rather in the nature of replications, but I shall treat it as raising the questions made in the argument.

The first question is, as to the power of the town to issue these bonds. The Supreme Court have declared that "a municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril." *Ottawa v. Perkins*, 94 U. S. 260-262. And they are equally invalid in the hands of innocent purchasers. *Marsh v. Fulton County*, 10 Wall. 676. The argument of the defendant's counsel denying the legislative authority to issue these bonds is based upon a distinction between paying for a subscription to the capital stock of the railroad company by levying taxes and paying the money, and issuing bonds in payment of the subscription; and it is contended that there being no express power granted to issue bonds in payment of subscription to stock, none will be implied; and the case of the *Police Jury v. Britton*, 15 Wall. 566, and the cases cited in Dillon on Municipal Corporations, § 407 and note, and *Folsom v. School District*, 11 Chicago Leg. News, 226, are relied on. The plaintiff contends that the statutes referred to in the statement of the case, confer express power to issue these bonds, and, if not, then that the power is a necessary implication from the authority given to make the subscription to the capital stock of the railroad company.

The act of March 13, 1868, amending the code, would undoubtedly have been sufficient to support these bonds, if it had not been subsequently modified by the act of December

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9, 1868, Chap. 11, § 26. The act of December 16, 1871 does not confer any new power, or enlarge the powers of the town in the matter of issuing bonds. It clearly contemplates subscription under the code, § 1142, *et seq.*, and only removes the restrictions there found as to the amount allowed to be subscribed by the town. The recital in the record of the town proceedings referring to the election of September, 1871, and the act of December 16, 1871, authorizing them to re-vote the subscription, shows conclusively that the town authorities supposed that they were making this subscription under the provisions of the code, § 1142 *et seq.*, as modified by the special acts relating to this particular town, as no doubt they were. Neither is there anything in the act of December 15, 1871, Chap. 129, which confers on this town the power to issue these bonds, nor anything from which such power may be implied.

The act of February 26, 1869, Chap. 59, § 20, as modified by the act of February 8, 1870, Chap. 55, § 18, unquestionably authorizes the town to issue *short bonds*, whatever that may mean, bearing six per cent. interest, "in anticipation of the collection of the annual levies." By the very terms of these acts the subscription is payable in four or six years, and I think the proper construction is, that the bonds shall not be longer running to maturity than the time within which the subscription is payable. The bonds are only to anticipate the annual collections of taxes to pay the subscription, which must all be paid "in not exceeding" four or six years. The Legislature did not contemplate that the people should be burdened with a long debt, bearing interest from date, when the statute required that the taxes to pay the subscription should be levied and paid within a time specified in the act itself. If bonds were issued under the power conferred by these statutes, necessarily they must be payable when the taxes levied to pay them are collected, for

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it is not to be supposed that the town would be required to levy and collect the taxes and keep them in the treasury idle to meet bonds maturing years after the collections are made. It is not like the case of *Ross v. Anderson County*, Supreme Court Tenn., MSS. opinion, 1874, at Knoxville, not yet reported, where the statute authorized thirty years' bonds to be issued, and the county in exact compliance with the statute issued bonds for that time, but upon a vote of the people proposing to pay the subscription in six annual installments. At the time the vote was taken in that case, the statute made no other requirement as to the time of payment than that not more than thirty-three and one-third per cent. of the subscription should be collected in one year. Act 1852, Chap. 117, § 8; Code, § 1154. Here the requirement of the statute was that the amount should be paid in six years. There a subsequent statute varied the terms which the vote had fixed; here the vote varies the terms which the statute has fixed. Nor is this like the case of *L. & N. R. R. Co. v. Davidson County*, 1 Sneed, 634, where it was held that the act of 1852 did not prohibit the county from making more than three installments. A comparison of section 8 of the act of 1852, Chap. 117, with section 20 of the act of 1869, Chap. 59, and with section 18 of the act of 1870, Chap. 55, shows that while under the act of 1852 there was no other restriction than that the time was not to be less than three years, under the two latter acts the time fixed is "not exceeding" six years. This is the necessary construction of the two acts of 1869 and 1870 taken together, even if it be admitted that the act of 1870, applying to "any city or incorporation" was intended to modify the special act of 1869 applying only to the town of Dyersburg. In this view the departure from these acts cannot be regarded as falling within the fourth resolution of the court in *R. R. Co. v. Davidson County*, *supra*. The principle of directory

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statutes cannot be applied here, and the authority conferred must be pursued in its material requirements. *Winston v. T. & P. R. R.*, 1 Baxter, 61.

Besides these acts only allowed six per cent. interest, and the bonds here bear seven per cent. This cannot be a change within the discretion of the town to make—it is an additional burden, not a beneficial modification of the requirements of the statute. I am not unmindful of the conventional interest act of February 23, 1870, Chap. 69, allowing an increase by contract to any rate, not greater than ten per cent. It will be observed that the first of these Dyersburg acts fixed no rate of interest for the bonds, and the second, limiting the rate to six per cent., was passed only a few days before the conventional rate of interest act just referred to, the latter being a general public law and the former a special private act. I do not think, under the general law, the town could enlarge the rate of interest. It was a municipal corporation acting under a special grant of power which could not be exceeded. The result is that these bonds, being for a longer time and greater rate of interest than allowed under these two acts, cannot be supported by them. *Bell v. R. R. Co.*, 4 Wall. 598; *New Albany v. Burke*, 11 Wall. 96. The case does not come within the case of *Rock Creek v. Strong*, 96 U. S. 271, and *Marion County v. Clark*, 94 U. S. 278, where there was a substantial compliance with the legislative requirement. Dillon on Municipal Corporations, § 414. It may be that if the bonds had been issued according to the terms of the act they would be valid *pro tanto* for six per cent. interest, as ruled in *Quincy v. Warfield*, 25 Ill. 317; but in the exercise of these special powers to impose the burdens of taxation upon a community, corporations should be held to a strict exercise of them, particularly in view of the peril to which the community is subject by a fraudulent use of such powers. Any purchaser of these bonds in look-

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ing to these statutes would see at once that the bonds were not such as the statutes contemplated. *Marsh v. Fulton Co.*, *supra*.

The remaining claim for express power to issue these bonds is based on the act of January 23, 1871, Chap. 50, Code, § 491a. It is argued for the plaintiff that the last clause of the second sub-section of section 1 of that act authorizes a town to subscribe for stock, and that the clause, immediately preceding, authorizes the board of mayor and aldermen to issue bonds in payment. It is manifest, however, that this construction is strained and wholly unauthorized by either the grammatical structure of the section or by any natural interpretation of it. The section follows identically the language of the Constitution in its restrictive clauses, and it is evident that both intend to indicate two corporate methods of giving aid to other persons or corporations; one of these methods—that of becoming a stockholder in a company—had been, so far as relates to encouragement of railroad building by stock subscriptions, regulated by a general law, since the act of January 22, 1852, Chap. 117; often, however, modified by special acts in particular cases, § 1142 *et seq.*; the other method, that of giving or lending the credit of the city or town, had never been the subject of any general statute, and was always regulated by special acts in particular cases. The two methods are entirely distinct in their nature and essential ingredients. *L. & N. R. R. Co. v. State of Tennessee*, 8 Heisk. 663 and cases cited *arguendo*, p. 667. It happens that as to railroad building, they both aid and encourage it; but the Constitution and the act apply to all corporate contracts within the scope of "corporate purposes" and to none other. Neither confers any authority either to lend credit or subscribe stock. But if the authority exists elsewhere this act regulates its exercise according to the Constitution and designates the

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County Court or the board of mayor and aldermen as the agents who shall issue the bonds when credit is lent or given. The validity of these railroad bonds and subscriptions all depend on the construction given by the Supreme Court to the old Constitution, that the promotion of railroads is a legitimate "corporate purpose," and not upon any legislative power to authorize corporations to engage in extraneous enterprises. *Nichol v. Nashville*, 9 Hump. 250; *L. & N. R. R. Co. v. Davidson County*, *supra*.

Interpreting the constitutional restrictions of 1870 and this act passed to enforce them by the previous legislative and judicial decisions, this giving or lending the credit of a county, city or town to some other person, company, association or corporation means supporting the credit of such other person, etc., by guaranties, indorsements or contracts of like character, and possibly donations or loans in aid of the enterprise, which must be a corporate purpose. *Dillon Municipal Corp.* § 393; *Nichol v. Nashville*, 9 Hump. 250 and cases cited in Cooper's edition; *L. & N. R. R. Co. v. Davidson County*, *supra*. The credit cannot be given or lent nor the subscription be made upon the authority of this act, for it confers none. It regulates in certain respects the general subject, and harmonizes all the statutes with the Constitution. When the corporation subscribes for stock, it must follow the general law on that subject, or some special law provided for it. The only effect of this act, or the constitutional provision referred to in it on the general law—and it so affects all special laws as well—is to abrogate all provisions allowing the subscription for stock to be made on less than a three-fourths vote of the qualified electors, voting at the election in favor of it. In all other respects the statutes authorizing subscriptions remain as they were before this act was passed. I am, therefore, of opinion that there is no express authority given by any statute to the town of Dyersburg to issue these bonds.

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It is insisted by the plaintiff that there is a power to pay the subscription in bonds to be implied from the authority to make the subscription, whether we look to the authority as contained in the railroad charter or to the general law authorizing such subscriptions. The authorities on this question are conflicting. Dillon on Mun. Corp. §§ 83, 106; Dillon on Municipal Bonds, § 62; Daniël on Negotiable Instruments, §§ 1530, 1532, 1533. I do not think there is any case decided by the Supreme Court of the United States which supports such an implied power under a general law containing the restrictions found in these Tennessee statutes; Code, §§ 1142-1165. And where the mode of payment is pointed out as is done here, I hold that any other mode is excluded, and that a bare power to subscribe for stock does not imply a power to pay for it in negotiable bonds issued to the railroad company on such terms as the parties may agree upon. The intimation in *Hitchcock v. Galveston*, 96 U. S. 341, if it does not militate against such an implied power is the latest indication in favor of it, but I find no decision of that court sustaining it. In *Seybert v. Pittsburg*, 1 Wall. 272, the implication was upon an act authorizing a subscription "as fully as any individual," and in *Meyer v. Muscatine*, 1 Wall. 384, the implication was upon a power "to borrow money," coupled with a general law authorizing railroads "receiving bonds of any city" to sell them at a discount. *Id.* 221. In *Rogers v. Burlington*, 3 Wall. 654 and *Mitchell v. Burlington*, 4 Wall. 270, the implication was upon a power "to borrow money for any public purpose," and in *Smith County v. Sac*, 11 Wall. 139-156, the statement of the proposition appears in the dissenting opinion only, the case being decided on other grounds. In *Lynde v. The County*, 16 Wall. 6, the implication was upon a statutory power to borrow money. In the Tennessee statutes, now under consideration, there is no power given to borrow

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money, nor to subscribe for stock as fully as an individual. On the contrary, the subscription for stock is regulated by a statute prescribing the mode of payment. The power to borrow money will not be implied. *Mayor v. Ray*, 19 Wall. 468, 475. It may be doubted if any case hereafter will extend this implication of power to issue bonds any further than it has already gone. 2 Daniel on Negotiable Instruments, §§ 1523, 1532; Dillon on Mun. Bonds, § 6.

The legislative construction in Tennessee is against any such implied power; and ever since the act of January 22, 1852, granting power to subscribe stock as therein specified, it has been the constant practice to confer express power to issue bonds to pay for stock subscriptions whenever thought advisable, as was done by the act of December 30, 1853, amending the general act of January 22, 1852, to allow Sumner county to pay her subscriptions. *L. & N. R. R. v. Davidson County*, 1 Sneed, 661. Very many such acts have been passed, and as we have seen, there is special legislation as to Dyersburg. This would seem to exclude any legislative sanction of the doctrine of an implied power based on the general authority given to make these subscriptions. It is said by the Supreme Court of Tennessee in *Moss v. Harpeth Academy*, 7 Heisk. 283, of a private corporation, that there is an implied power to borrow money to carry out the purposes of its organization, and it is shown by a note to that case, that other courts have applied this doctrine to municipal corporations, notably the case of the *Bank v. Chillicothe*, 7 Ohio, 358, cited by counsel here. And see, also, Dillon Mun. Corp. §§ 106, 107 and notes, and § 407.

There seems to me to be a vast distinction between using private funds, and implying this power to borrow money upon negotiable bonds against a body of people who have organized a municipal corporation with limited powers of taxation for special purposes. Yet, the Supreme Court

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of Tennessee have said in the case of *Adams v. M. & L. R. R. Co.*, 2 Coldw. 645-650, that there is an implied power to borrow money for corporation purposes belonging to municipal corporations. And, relying upon the settled doctrine in Tennessee that railroad building is a corporate purpose, the learned counsel for plaintiff presses with great earnestness the doctrines of that case. We are asked, upon its authority, to imply a power to borrow money for this corporate purpose, and then again to imply from the power to borrow money the power to issue negotiable bonds. In *Nashville v. Ray*, 19 Wall. 479, it is said that this declaration of the Supreme Court of Tennessee in *Adams v. M. & L. R. R. Co.*, *supra*, was not necessary to the decision of the case, as it clearly was not. The case of *Nichol v. Nashville*, *supra*, does not support the implied power to issue bonds where authority to subscribe stock is given under a statute appointing the mode of payment. In that case there was express power to issue the bonds, and even if it had been necessary to their support to rely on any implication of power, the charter of the railroad company in that case authorized corporations to subscribe stock "with all the rights of any other stockholder." This is directly within the case of *Seybert v. Pittsburg*, *supra*, where the words were "as fully as any individual." Here there are no such words, either in the railroad charter or in the act of 1852, under which this town acted. There are decided expressions in the case, pp. 262, 263, in favor of powers by construction, but confessedly they did not arise, and we have the authority of the same court for saying that "the reasoning, illustrations or references contained in the opinion of a court are not authority, not precedent, but only the points in judgment arising in the particular case before the court." *L. & N. R. R. Co. v. Davidson County*, *supra*. The case of *Ross v. Anderson County*, *supra*, is much relied on by plaintiff. This

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is also a case in which there was express power to issue the bonds, and they were issued in exact conformity to the statute. There is a very strong expression in the opinion in this case in favor of the incidental right to issue bonds or other commercial evidence of debt, wherever the power to contract is given, but it is manifest that the case is not an adjudication on the point, and it could not have been, for there was no want of a positive grant of power to issue the bonds, and the decision is put upon that ground. I am unwilling to adjudicate in the absence of a controlling authority that a municipal corporation has power to issue coupon bonds in payment of any debt it is authorized to contract. No case that I have found decided, either by the United States Supreme Court or the Supreme Court of Tennessee, has gone that far as an adjudication. And after a most patient and deliberate examination of the subject, I am of the opinion that the defendant corporation had no power to issue these bonds to be implied from the authority to subscribe stock. This judgment is supported by the reasoning in the case of *Gause v. Clarksville*, 19 Alb. Law Journal, 253, where the question is examined by Judges DILLON and TREAT upon authority and principle. The opinion of one of the learned judges in that case, as shown in the second division of the opinion, would seem to be against the views here expressed, but I think there is here in Tennessee no universal practice to issue bonds without special authority, as in Missouri, in payment of stock subscriptions. And I have endeavored to show that the United States Supreme Court have not yet decided in favor of any such implication of power. Until it decides the point, I cannot yield my own strong convictions against the doctrine, acquired by this investigation.

I have also considered the other question, raised by the pleadings, as to the effect of the condition mentioned in the

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face of the bond. These coupons not containing on their face the condition expressed in the bonds, unless the reference to the number of the bond is to be so taken, the first question argued is, whether they are affected by the recital in the bond? If this can be regarded as an open question since the case of *McClure v. Oxford*, 94 U. S. 429, it is not raised by the demurrer. *Harshman v. Bates County*, 92 U. S. 569. The third, fourth and fifth pleas aver that the plaintiff had notice of the condition and its breach. He may have had such notice otherwise than by the expression of this condition on the face of the bond. The demurrer admits this averment of notice, and the only question is, whether the facts stated constitute a defense. It is not denied by the plaintiff that, if this be a condition precedent to the payment of the bonds, they are not negotiable and are subject to all the defenses which could have been made against them in the hands of the original holder. Indeed, as the pleas charge notice of the failure to comply with the contract on the part of the railroad company, the case must be treated as if the railroad company itself were the plaintiff. So many decisions have been made upon the vexed question of what are, and what are not, dependent covenants, that, being irreconcilable with one another, they rather perplex than aid the judgment in determining a given case. That the intent of the parties is to control is a universal rule. *Officer v. Sims*, 2 Heisk. 501; *Grant v. Johnson*, 5 N. Y. 247, 255. The intention is to be ascertained from the contract; there is nothing technical in it. The parties have a right to make their agreements dependent or independent, and as they make them the courts are bound to enforce them. *Clermont County v. Robb*, 5 Ohio, 491. Where parties have made an express contract none can be implied, is an axiom in the law particularly applicable to this subject. *Cutter v. Powell*, 2 Smith's Lead. Cases, 207; *Hudson*

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Canal Co. v. Penn. Coal Co., 8 Wall. 276. In the notes to *Pordage v. Cole*, 1 Wms. Saunders, 319, 320a, Sergeant Williams has deduced from the cases certain rules for ascertaining the intention, which have all the force of judicial decision because they have been referred to and adopted by almost every court considering the subject from that day to this. But in the application of these rules the courts have great difficulties, and there is no subject in our jurisprudence more beset with conflicting decisions. The difficulty is determining whether one promise be the consideration for another, or whether the performance and not the mere promise be the consideration. As in this case, was the construction of the railroad to Dyersburg or the undertaking of the company to construct it to that place the consideration of these bonds? It is said that this is to be determined by the intention and meaning of the parties as shown in the face of the instrument, and by the application of common sense to each particular case. Chitty on Contr. 11 Ed. 1082; *Stavers v. Curling*, 3 Bing. N. C. 355, S. C. 32 E. C. L. 159; *Taylor v. Mason*, 9 Wheat. 327. The court will not confine itself to particular expressions but will collect the intention from the whole instrument. Chitty on Contr. 122. And every part must have its effect. Ibid; *Herschel v. Mahler*, 3 Denio, 428, 431; *Haywood v. Perrin*, 10 Pick. 228. Where there are mutual covenants or acts they are construed to be dependent, unless a contrary intention appears, and there is good sense as well as practical convenience in the rule. *McNeill v. Magee*, 5 Mason, 244, 255. The Supreme Court of the United States have said that although many nice distinctions are to be found in the books upon the question "whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet, it is evident the inclination of courts has strongly favored the latter construction, as being obviously

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the most just. The seller ought not to be compelled to part with his property without receiving the consideration; nor the purchaser to part with his money without an equitable return." *Bank of Columbia v. Hagner*, 1 Pet. 455, 465. This is said in a case of vendor and vendee of an estate, but it applies as well to all contracts. It is undoubtedly true that in cases involving the forfeiture of estates, and perhaps in ordinary commercial contracts, where the language of an agreement can be resolved into a covenant, the judicial inclination is to so construe it. And where a party has another remedy for an injury inflicted by the non-performance of a condition, which may be compensated in pecuniary damages, he will be remitted to that remedy. *Paschall v. Passmore*, 40 Penn. State, 295, 307. The reason of this distinction is stated to be that the other consideration prevents the court from dealing out justice to the parties according to the equities of the case. *Railroad Co. v. Butler*, 50 Cal. 575. But this doctrine appertains rather to courts of equity than those of law, and can never be invoked to destroy the clear intention of the parties, and where the enforcement of the rule would operate to inflict injustice on the other side. In a case like this there can be no compensation in damages. How could this town be compensated in damages by a failure to build a railroad to it? Nothing less than money enough to build the entire road from Paducah to Memphis would answer as compensation, in case of total failure to build it. The object of this subscription was to secure the road to that town, and whatever they may have technically expressed by their contract, I have no doubt they intended to secure the construction of this road by making their contribution dependent upon the performance of the condition, and did not intend to rely upon any mere covenant on the part of the railroad company secured against a breach by an action for damages. Where the acts stipulated to be done are to be

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done at different times the stipulations are to be construed as independent of each other. *Goldsborough v. Orr*, 8 Wheat. 217. This rule is not inflexible but yields wholly or in part to the intention of the parties, and the good sense and equity of the case. *Cunningham v. Merrell*, 10 Johns. 203, and cases cited in note to *Wilks v. Smith*, 10 M. & W. 360, by Hare & Wallace. A more practical test for all cases is, whether the defendant reasonably appears to have looked to the plaintiff's covenant, or to its performance as the consideration and condition of his being bound. *Ibid.* Here, however, no time is fixed for building this railroad to Dyersburg. The law implies that a reasonable time was intended to be given. *Chitty Contr.* 1062; *Davis v. Gray*, 16 Wall. 204, 231; *Cooke v. Taylor*, 2 Tenn. 49. The act of January 27, 1870, chap. 49, § 5, allowed seven years from the date of the act for the completion of the road. The bonds being issued subsequent to that amendment the parties are supposed to have contracted with reference to it, and this fixes the time within which this condition should have been performed, and it had expired when this suit was brought, and about six years before this money was payable; so that the rule operates the other way, unless the fact, that some of the coupons fell due prior to that time, changes it. The town may have been willing to pay the coupons falling due prior to the date designated by statute as the time for the completion of the road; relying upon the security which the condition gave as to the remainder. They could make this contract if they chose, and we have seen that the rule yields to the actual intention.

There are some cases which hold that, if part of the money be payable before the act is to be done by the other side, the respective promises are independent as to the installments of interest; but these cases have, in their peculiar facts, furnished other evidences of such intention, such as delivery

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of possession of the thing sold. Generally, however, the cases have been those where the principal money was payable in installments. *Wilks v. Smith*, 10 M. & W. 355; *Mattock v. Kinglake*, 10 A. & E. 50, 37 E. C. L. 37; *Dicker v. Jackson*, 60 E. C. L. 102; *Edgar v. Boies*, 11 S. & R. 445; *Chitty Contr.* 1082 and cases. It was held in *Loan Association v. Topeka*, 20 Wall. 656, that the mere payment of interest would not work an estoppel, and I think the application of this rule of part payments to installments of interest, aside from other controlling circumstances is a perversion of the rule itself, and often would operate to defeat the intention. It should only be applied where the mode of payment of the principal money indicates that the parties could have had no other intention than that the promises should be independent. *Gardiner v. Corson*, 15 Mass. 500, shows that annual payments of interest do not bring the case within the rule of payment by installments. The plaintiff here also relies on the rule that where an essential part of the consideration has been paid, the party receiving it will not be allowed to defeat a recovery against him because some remaining portion of the whole consideration remains unperformed, the argument being, that the town has received the stock of the railroad company for which it subscribed, and because the whole consideration has not been received it cannot refuse payment. *Chitty Contr.* 1092. This question might become important if the railroad company were in a condition to tender performance of its undertaking, but the pleas aver that it has been foreclosed and its property and franchises sold under a mortgage. If a party has disabled itself from fulfilling the contract, there is already a breach, and the contract is at an end. *Chitty on Contr.* 1079-1084. And the non-performance of one part of a contract is not excused by showing performance of another part. *Idem*, 1079; *Cutter v. Powell*, 2 Smith's Lead. Cases, and notes, is

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a case that discusses this doctrine; and it will be found that the rule does not apply where the main and essential part of the consideration remains unperformed. Here, the chief consideration was the railroad facilities to be acquired by the construction of the road to the town. It is well known, that in these days, stock in railroad companies, as property, is not of much value, and the shares are not, in this class of cases, any very essential part of the consideration.

The case of *Humboldt v. Long*, 92 U. S. 642, is not like this case. The bond did not show any condition, and therefore the subsequent use of the words "upon the performance of this condition" had no force. If the bond had said "payable upon express conditions that the road be constructed through the township," it would have been this case, but it does not so say. In *Pendleton County v. Amy*, 13 Wall. 305, the condition was precedent to the issuance of the bonds, and its performance was presumed from the recitals in the bonds and the fact of their issuance. But here the condition is attached to the payment of the money.

Usually, these bonds are issued in aid of the road without incumbrance as to conditions, and it would have been better for the railroad company had these bonds have been so issued. But the parties could attach this condition to their contract, and the bonds were not valueless if the condition has been performed. It was simply a transfer of confidence in the railroad company from the town to the capitalist, who takes the bonds. It is he who trusts the railroad company in this case, and not the defendant corporation. It was a wise contract on the part of the town, and it has taken the precaution to inform persons dealing in the bonds of the fact that it had attached the condition to the contract by this recital. The language of the proposition as voted, and the proceedings of the town authorities do not indicate any other condition than that shown on the face of the bond. But if they did, the

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expression in the bond itself is not ambiguous. The case of *Miller v. Pittsburg R. R. Co.*, 40 Penn. St. 237, falls directly within the case of a contract for payment before the road was to be built, and to build it. The principal money—the subscription itself—was all due two years before the road suspended. Here it is deferred for ten years, and the charter of the company required the road to be completed six years before these bonds were due. The case of *Brooklyn v. Aetna Life Ins. Co.*, decided by the United States Supreme Court, October term, 1878, (not yet reported) 11 Chicago Legal News, 319; 8 Centr. Law Jour. 422; 19 Albany Law Jour. 361, is a clear recognition of this defense as a good one. And there can be no doubt that if the bonds in that case had on their face given notice, as in this case, the plaintiff would have failed. The case of *Conrad v. Portsmouth Savings Bank*, 92 U. S. 625, is directly in point in favor of this opinion. There the act of the Legislature attached the condition to the subscription; here the contract of the parties attached it. There the bonds were void; here the condition, being broken, the bonds became valueless. The case of *N. & N. W. R. R. Co. v. Jones*, 2 Coldw. 574, is also an authority directly in favor of this conclusion.

The importance of this case demands, and has received my most careful consideration, and the defenses set up have raised some of the most perplexing questions known to the law. This must be my apology for the delay in deciding it, and the fullness of the opinion.

Demurrer overruled.

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RUFUS OSBORN vs. MICHIGAN AIR LINE RAIL-
ROAD COMPANY ET AL.CIRCUIT COURT—EASTERN DISTRICT OF MICHIGAN—AUGUST,
1879.

JURISDICTION—BILL TO IMPEACH FOR FRAUD—AVERMENTS NECESSARY.—In a proper case a decree may be impeached collaterally in another court; but where a bill is brought to set aside and declare void a decree rendered in this court, whether on the ground of fraud or otherwise, this court being the one in which the decree was rendered, is the only tribunal which can properly take cognizance of such a bill.

2. PARTY HAVING AN INTEREST MAY INTERVENE, WHEN.—It has been frequently ruled in the Courts of the United States that a person, having an interest though not a party to the suit, may intervene to assert his rights without reference to the citizenship of the parties.

3. BUT IF THE DECREE ASSAILED HAS BEEN EXECUTED?—Where a court has jurisdiction of a suit brought to impeach a former decree for fraud, if the decree has been carried into execution, the party complaining of the former decree may be put into the situation in which he would have been if the decree had not been executed.

Alfred Russell, for complainant.

Meddaugh & Pond, for defendant.

The facts are fully stated in the opinion.

WITHEX, J.—Complainant was a stockholder in the Michigan Air Line Railroad in 1873, when suit was commenced in this court to foreclose a mortgage made by that corporation to secure bonded indebtedness. Scammon, a trustee, was plaintiff, and the corporation and others defendants. The railroad corporation, by its directors, appeared and answered, and proofs were taken. At the hearing, in January, 1875, a decree was entered against the company for \$265,000, and

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for a sale of its road. The sale took place in June of last year, defendant Young being the purchaser at \$25,000. In November following, the road was reorganized by Young and his associates, under the name of the Michigan Air Line Railway Company, with a capital of \$300,000.

The bill now before the court was filed in October, 1877, by the complainant in his own behalf, and of all other stockholders who might come in under his bill, for the purpose of impeaching the decree for fraud and collusion on the part of plaintiff and officers of the defendant railroad company in that suit. The particular fraud is stated to be a fraudulent agreement, signed and introduced at the hearing, admitting the indebtedness which was decreed. The prayer is that the decree be declared fraudulent and void, and that the sale be set aside. Other matters are stated in the bill not necessary to refer to, except that it is stated, as an excuse for delay in bringing this bill, that complainant was ignorant of the foreclosure suit, and did not discover the fraud until after the decree had been executed, from which time he had been diligent, etc. It should further be said that the bill alleges notice of the alleged fraud to the purchaser under the foreclosure sale, to those who are connected with him in the new corporation, and to the corporation itself. It also appears by the bill that complainant is a citizen of Michigan, and that both the defendant corporations named in the suit are Michigan corporations, and were citizens of the same State as complainant.

Demurrers were interposed, under which several questions have been presented for consideration. The most important is jurisdictional, growing out of the citizenship of the parties referred to. The fact that complainant and necessary defendants are citizens of the same State will defeat jurisdiction in this court in any case depending upon the terms of the act of Congress defining the original jurisdiction of the

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Circuit Courts of the United States. In other words, if this is purely an original bill, then jurisdiction exists only when the plaintiff and necessary defendants are citizens of different States. Again, if this is purely a bill of review, there is no jurisdiction, inasmuch as more than two years elapsed after the decree was rendered before this bill was filed; and for this reason all matters that point to errors in the decree are improperly presented by this bill.

I entertain the opinion that the question whether this bill can be entertained is not dependent upon the citizenship of the parties; and, also, that this is neither purely an original bill, nor a bill purely of review. It is believed to partake of the nature of an original bill, having for its object the review of the proceedings in the original cause, in order to ascertain whether the decree therein should be impeached for fraud alleged to have been practiced by the parties in obtaining it. Story's Eq. Plead. sec. 426. If no other court can entertain a bill or suit, brought for the purpose of impeaching such decree for fraud, then this bill is necessarily brought here, and may, therefore, be said to be the outgrowth of the original suit—an incident of it—from jurisdiction over which flows the jurisdiction to entertain this bill, without reference to the citizenship of the parties.

It is not doubted that in a proper case the decree sought to be impeached by this bill could be impeached collaterally for fraud in another court; but it is believed that no other tribunal can properly take jurisdiction of a suit brought for the purpose of declaring such decree void, whether for fraud or otherwise. The Circuit Courts of the United States, and the courts of the State, are essentially, as to each other, foreign forums. Neither can entertain a suit brought for the purpose of declaring fraudulent and void a judgment or decree of the other, precisely as neither can entertain a suit brought for the purpose of declaring fraudulent and void a

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judgment or decree of the Court of King's Bench of England. The judgment in *Amory v. Amory*, 12 Am. Law Reg., New Series, 585, is not believed to conflict with the views expressed. See, also, p. 39, same case.

It has been frequently ruled in the Courts of the United States, as was shown by cases cited upon argument, that a person having an interest, though not a party to the suit, may intervene to assert his rights, without reference to the citizenship of the parties. *Freeman v. Howe*, 24 How. p. 460; *Buck v. Colbath*, 3 Wall. p. 345; *Jones v. Andrews*, 10 Wall. 333; 14 Wall. 82; 15 Wall. 195; 22 Wall. 252; 1 Woods' Cir. Ct. R.; *Campbell v. Railroad Co.*, 368. See, also, *Forbes v. Railroad Co.*, 2 Wood's R. p. 323.

But it was claimed that when the decree has been executed, no such auxiliary or incidental proceedings can be had. It does not appear to me that there should be any such limitation. No cases are found supporting that view; indeed, no case like the present has been found or cited.

Certain it is, where a court has jurisdiction of a suit brought to impeach a former decree for fraud, if the decree has been carried into execution, the party complaining of the former decree may be put into the situation in which he would have been if the decree had not been executed. *Milford and Tyler*, 6 Pl. & Pr. in Equity, p. 186; *Adams' Eq. (Am. Ed)* 832; *Story's Eq. Pl. sec. 426*.

What the effect would be if the purchaser at the sale in execution of such decree had no knowledge of the fraud, there is no occasion to decide, in view of the averment of this bill that there was notice. See *Shelton v. Tiffin*, 6 How. 183-186, as to when a purchaser is protected.

Without further discussion, the objection taken on the ground of want of jurisdiction is overruled. The question is not clear from doubt, but this is my judgment.

In conclusion, the bill is regarded in other respects sub-

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stantially defective in making a case for relief. It is not only singularly vague and uncertain in its statements, but lacks essential averments to make a case for the relief prayed. These defects were pointed out by counsel for defendants, and will not now be repeated. I have thought possibly complainant might obviate all the objections to which his bill is obnoxious by amendments, and for that reason have indicated that upon a proper bill the court would entertain jurisdiction. The demurrers are sustained for the reason stated. Leave, however, is given to complainant to amend his bill within thirty days, if he shall be advised that a case for relief can be presented. Costs are to the respective demurrants, including the usual solicitor's fees to each.

ROBERT D. BEVERLY v. DAVIDSON COUNTY.

CIRCUIT COURT—MIDDLE DISTRICT OF TENNESSEE—OCTOBER,
1879.

An instrument not a promissory note, not negotiable by *the law merchant*, even if placed upon that footing by a local statute, is not within the exception of Sec. 1, act March 3, 1875, authorizing suits in the United States Circuit Courts by assignees of "promissory notes negotiable by the law merchant," irrespectively of the citizenship of the assignors.

This was an act of *assumpsit* by a citizen of Virginia, as the indorsee of certain Davidson county warrants, drawn by the county judge upon the county trustee, in favor of Samuel Donelson, clerk of the criminal court of said county, without the addition of the words, "or order," or, "or bearer," and indorsed by the payee.

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R. McP. Smith, for the plaintiff, said:

County warrants payable to a party *or order*, or to a party *or bearer*, are negotiable promissory notes. Story on Prom. Notes, § 16; *Miller v. Thompson*, 3 Man. & Gran. 576; *Lyell v. Supervisors of Lapeer Co.*, 6 McLean, 447; *Fairchild v. Ogdensburg, etc., R. R. Co.*, 15 N. Y. 337; *Bell v. Sims*, 23 N. Y. 570; *Campbell v. Polk Co.*, 3 Iowa, 469; *Steel v. Davis Co.*, 2 G. Green, (Iowa,) 469; *Hasey v. White Pigeon Beet Sugar Co.*, 1 Doug. 193; *Crawford Co. v. Wilson*, 2 English, (Ark.) 114; *Justices v. Orr*, 12 Georgia, 137; *Kelly v. Brooklyn*, 4 Hill, 263.

True, these warrants lack the negotiable words; but they are supplied by our code, § 1957:

Every bill, bond, or note for money, whether sealed or not, and whether expressed to be payable to order, or for value received, or not, *shall be negotiable in the same manner as promissory notes.*

“The laws which exist at the time and place of the making of a contract, and where it is to be performed, *enter into and form a part of it.*” *Walker v. Whitehead*, 16 Wall. 317.

Guild & Dodd and *Thos. H. Malone*, for the defendant.

BAXTER, J.—Plaintiff's declaration presents a question of jurisdiction which must be met and disposed of at the threshold. He sues on what is familiarly known as a “county warrant;” insists that it is negotiable, and that as assignee thereof, he can, under the act of March 3, 1875, entitled “An Act to Determine the Jurisdiction of Circuit Courts,” etc., maintain his action in this court. His position is correct, provided he can bring his case within the purview of that act. But this is the point in regard to which we think he fails.

The negotiability of written promises to pay money, has

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been greatly extended by State legislation. The statute of Tennessee may be cited as an example. Here, "bills, bonds and notes for money, whether expressed to be payable to order or bearer, or not," are made negotiable "in the same manner as promissory notes." But the act of 1875 does not profess to confer jurisdiction on the Federal Courts in favor of assignees of negotiable paper generally, but in favor of assignees of promissory notes negotiable *by the law merchant*. This law merchant is a distinct branch of jurisprudence as well defined and understood as the law of descent. It prevails in this and in every other enlightened commercial country. In restricting the jurisdiction to assignees of notes negotiable by the law merchant, we must assume that Congress intended to convey the meaning which the language of the act clearly imparts. It is not necessary, therefore, that I should pass on the question whether the warrant which is the foundation of this suit, is or is not negotiable under the Tennessee statute, and we purposely decline to express any opinion on that point.¹ But we have no hesitation in holding that it is not negotiable by the law merchant. It follows that this court is without jurisdiction and plaintiff's suit will be dismissed.

¹ The Supreme Court of the State, a few days after this opinion was announced, held at Knoxville, in the case of *Camp v. Knox Co.*, that county warrants, like the one sued on in this case, were not negotiable. See 8 Lea, 199.

On Petition of Miller Hurst.

ON PETITION OF MILLER HURST.

DISTRICT COURT—MIDDLE DISTRICT OF TENNESSEE—OCTOBER,
1879.

HABEAS CORPUS—KILLING UNDER ORDERS IN TIME OF WAR.

Where a soldier in the regular service during the war of the rebellion, while acting under the orders of his superior officer, led, or was a member of, a company, which was ordered to fire upon all bushwhackers, and in consequence thereof, one such was killed, and said soldier was afterwards tried for murder, convicted, sentenced and sent to the State prison: *Held*, that the State Court had no jurisdiction to try such case, and he was entitled to his discharge, notwithstanding he was already undergoing his sentence.

Hurst was convicted by the Morgan County Circuit Court of having murdered one Thomas Staples, a captain in the confederate army. He was sentenced for fifteen years in the State penitentiary, where he had already served ten months when this application was made.

The proof was that at the time the act was committed, February 2, 1865, Hurst was a member of Capt. D. Beaty's company, which was recognized as belonging to the United States army. The company had been ordered to exterminate all bushwhackers, and Staples was regarded as of that class. The company, composed of forty men, came across Staples on the day mentioned. He mounted his horse and attempted to escape. As he passed over a hill the company fired a volley at him. He afterwards died from the wounds received on that occasion.

John P. Murray, for the prisoner urged that, notwithstanding the fact that Hurst had allowed final judgment to

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be passed upon him, and had gone to the penitentiary,¹ there were good reasons why he should be discharged. The deed, if committed by Hurst, was done in obedience to the command of a superior officer in time of war.

TRIGG, J., said the case was a novel one, inasmuch as it was very rare that one court interfered with the judgment of another after it had gone into effect, and this was the first instance of a decision on the subject in Tennessee. While he might have some doubts on the question, yet he was inclined to decide in favor of liberty under the facts presented, and would therefore order the discharge of the prisoner. He made the following order:

“MILLER HURST.—EX PARTE PETITION FOR HABEAS CORPUS.

“In this case it appears to the court that Miller Hurst is confined in the penitentiary of the State of Tennessee on the charge of murdering Thomas Staples, in Morgan county, Tennessee, in January, 1865, under sentence of the Circuit Court of Morgan county, Tennessee.

“It appearing to the court that Thomas Staples was a soldier of the army of the confederate States, and that the petitioner was a soldier of the army of the United States, and that the killing was an act of war done during the war of the rebellion, under the orders of the President of the United States, in a section of country then under military occupation by the forces of the United States, from which the confederates had been driven during the war. It appears to the court that the Circuit Court of Morgan county, Tenn., had no jurisdiction of the offense for which the petitioner is being held; that the killing having been done during the war, under orders as aforesaid, and in a

¹ In Tennessee this is the State prison. [*Reporter.*

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country under military occupation, was not cognizable by the Circuit Court of Morgan county, Tenn., and the said Miller Hurst is unlawfully restrained of his liberty.

"It is, therefore, ordered that the said Miller Hurst be discharged from said imprisonment and released from custody, and that the petitioner pay the cost of this proceeding; and if not paid, let execution issue, and that a copy of this order be furnished to the warden of the penitentiary."

IN RE McLEAN.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—
NOVEMBER, 1879.

RIGHT TO INSPECT COURT RECORDS.

An unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist. Such right exists only as allowed by statute or rule of the court.

Thomas Campbell, for McLean.

Geo. Hoardly and *W. M. Bateman*, for clerk.

SWING, J.—This is a petition filed by Mr. J. R. McLean and the Enquirer Company, in which they set out that heretofore, to-wit, on the 7th day of November, 1879, application was made to Thomas Ambrose, clerk of this court, by J. H. Woodward, an agent of said Enquirer Company, for leave to inspect during office hours books containing the docket and minute entries, judgments, and decrees of the said District

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Court and the United States Circuit Court, and that the said clerk then and there refused the said J. H. Woodward the privilege to so inspect or examine the books aforesaid. Your applicants would, therefore, respectfully ask the court to order that the judgments and decrees of said court, including the fee books and other books containing the public records and orders of said court, be open to the inspection of the said J. H. Woodward, agent of the said Enquirer Company and of said John R. McLean, under such regulations as to the court may seem proper. With this application there is filed the affidavit of one James H. Woodward, in which he says that he is employed by the Cincinnati Enquirer Company, a corporation doing business under the laws of the State of Ohio, and that acting under the orders of John R. McLean, the manager of said corporation, he made personal application to Thomas Ambrose, clerk of the United States Circuit and District Courts, for permission to examine the public record, fee books and decrees of said court, and permission was refused him by the said Thomas Ambrose, clerk as aforesaid; and said application was renewed on this day and date by him, as a citizen having the right to inspect said books, decrees and minutes, and was again refused.

To this application there is filed by the clerk a demurrer on the ground, that the petition does not contain facts sufficient to entitle the applicants to the order they pray for.

This proceeding, in one sense at least, is adversary in its character, and yet it is based upon the alleged refusal by an officer of this court of permission to exercise an alleged right of the petitioner. The right which they allege was refused was that of having one J. H. Woodward to inspect, during office hours, books containing the docket and minute entries, judgments and decrees of the District Court and the United States Circuit Court. This right is based solely upon the ground that John R. McLean is a citizen of the United

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States and that the Enquirer Company is located in the United States. It is not claimed for either that they have any interest in the docket or minute entries, judgments and decrees recorded in said books. If the prayer of the petitioners prayed simply for the right which they claimed an officer of this court had deprived them of, there would be no difficulty in determining the case. But such is not the fact. They pray for an order that the judgments and decrees of said court, including the fee books and other books containing the public records and orders of said courts, be open for the inspection of one J. H. Woodward. It will be seen at a glance that their prayer is greatly beyond what they allege they were not permitted to examine. That was the books containing the docket or minute entries of the judgments and decrees, but this is not only that the judgments and decrees may be examined, but that all other books containing the public records and orders of the court shall be opened to their inspection. So much for the allegations of the petition itself.

But let us see how the allegation of the right, which they allege they were deprived of, is supported by the affidavit which has been filed. The petition says that the application was for leave to inspect the books containing the docket and minute entries, judgments and decrees. The affidavit of the man Woodward is that he applied for permission to examine the public records, fee books, and decrees, showing clearly and conclusively that the petition is not supported by the affidavit. Such is this application, as shown from the papers filed. But it is claimed that notwithstanding the variance between the allegations of the petition and the prayer, and the variance between the proof and allegations, petitioners are entitled in law to the order prayed for; that they are so entitled by the statutes of the United States, or if not by them, they are by the common law entitled to it; that all the

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books and papers of a court of record are subject to the examination and inspection of any citizen, whether he have any personal interest in them or not; that it is his high and indefeasible right, at any time he pleases during office hours, to make such inspection. If this is true, it is very clear that the petitioners are entitled to the order prayed for. The doctrine is a new and strange one, and certainly finds no support in any adjudication which I have been able to find, and I am very certain none can be produced sustaining any such proposition. But the very formation, purposes and duties of a court forbid such an idea. The court is composed of judge, ministerial and executive officers, together with the attorneys that are members of it. To this body so organized are committed for determination the highest interests of the citizen in his property, his reputation and his person. And a careful record of every step which may be taken in relation to either must be carefully made; every paper connected with any proceeding affecting any one in either of these must be carefully filed and preserved. The title to the entire property of the whole country passes through the courts of this country almost in every half century. They are the repositories of the rights of persons and of property, and in many cases the only evidence of either, and the law imposes upon the court the duty of their secure and careful protection and preservation; a protection and preservation which would be greatly jeopardized if every citizen of the United States at his pleasure and will should be permitted to examine and inspect them in his own way. Not only is such an idea in opposition to the formation, purposes and duties of the court, but it is clearly in opposition to the views of the highest judicial and legislative branches of this government. At a very early day, the Supreme Court of the United States adopted a rule, known as the fourth rule, which provides that "all motions, rules, orders, and other proceedings made

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and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit of equity and their solicitors." If the Supreme Court believed that all the books and records belonging to the court were open to the inspection of every citizen of the United States, why did they enact such a rule? Or why did they limit the right of inspection to parties and their solicitors? This rule itself is the most convincing proof that no such right, as claimed by the petitioners, was supposed by the judges of the Supreme Court to have existed.

But it is claimed by the learned counsel for the petitioners that there is a difference between suits in equity and at law; that there could hardly be a case in equity in which the government could have any interest. It is not perceived by the court upon what reason there can exist any difference in the care and custody of the records and papers in equity causes and actions at law, but learned counsel are mistaken in regard to the interest of the government in equity causes. The records of this court show numerous causes in equity in which the government of the United States is plaintiff. But it is said, if that is so, that the citizen is a party in interest, and would have a right to look into the records. In some general political sense it may be true that the citizen is a party in interest in every suit prosecuted in the name of the United States; but in a legal sense he is not such a party in interest as is contemplated by this rule.

That Congress entertained the same view is abundantly shown by its acts. In 1848 it enacted a law providing that "all books in the office of the clerks of the Circuit and District Courts containing the docket or minute of the judgments or decrees thereof, shall during office hours be open to

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the inspection of any person desiring to examine the same without any fees or charge therefor." If Congress believed the right already existed, why did they think it necessary to create such right by special legislation? Or if they believed it ought to exist, why did they limit the right to particular books, such only as contained the docket or minutes of the judgments or decrees? And again, by the act of February, 1875, Congress provided: "That the accounts and vouchers of clerks, marshals, and district attorneys shall be made in duplicate to be marked 'original' and 'duplicate,' and it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the treasury, and to retain in his office the duplicate which shall be open for public inspection at all times." If the public had the right already to inspect such papers, why did Congress deem it necessary to create such a right by the passage of this act?

It is, therefore, very clear to my mind that the unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist. The right to examine certain records and papers does exist. It exists as to the books containing the docket or minute entries of the judgments and decrees of the court, and these the petitioners allege that they have been refused by an officer of this court. The prayer of the petition is not in accordance with this averment, and the affidavit is different from both. This petition, however, must be governed by the rules of pleading in other cases, so far as the demurrer is concerned. If the party is entitled to any part of the relief he prays for a general demurrer must be overruled.

This application for the interference of the court is based upon the allegation that the petitioners have been deprived of a right given them by the law by an officer of the court. This is denied on behalf of the officer by two members of

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the bar, who are officers also of this court, and who appear in this proceeding on behalf of the clerk. This is a charge which the court is interested in having examined, and the truth or falsity thereof established. The demurrer will therefore be overruled, but no order will be made until a further hearing of the matter is had before the court, when we shall finally determine whether the petitioners are entitled to the order as prayed for.

BAXTER, J., concurred.

The judges afterwards granted *ex gratia* what they ruled the petitioner was not entitled to, as a matter of law. [*Reporter*.

POST & CO. v. TAYLOR COUNTY.

CIRCUIT COURT—DISTRICT OF KENTUCKY—NOVEMBER 21,
1879.

1. BONDS ISSUED BY COUNTY IN AID OF A RAILROAD—JURISDICTION—PRIVITY.—Bonds issued in aid of a railroad by a County Court, authorized so to do by law, are binding obligations, and while there is no such privity between the purchasers of said bonds and the tax debtors as would authorize a suit at law, such a case comes within well-established equity jurisdiction.

2. SAME—COLLECTION OF TAXES.—If no one can be found able and willing to collect the taxes, when loaned by the County Court to pay creditors who have obtained a decree on interest coupons, on bill filed this court will entertain jurisdiction.

3. THE COURT WILL MAKE ALL SUCH ORDERS AS MAY BE NECESSARY TO ATTAIN THIS END—PRACTICE.—In such case the court will direct the payment of taxes so assessed into the registry, to be applied in satisfaction of complainants' decree; and against each defendant debtor, who shall not so pay within the time specified in the order, an execution will issue.

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5. OTHER PROPERTY HOLDERS—HOW MADE PARTIES—ANCILLARY PETITION.—Should the property of parties, made defendants, be not sufficient to pay the amount due complainants, on application therefor, a receiver will be appointed, authorized to collect taxes assessed for the purpose against other property holders, not parties to this cause. And should they not pay within a reasonable time, the receiver will be instructed to bring them before the court by ancillary petition.

4. SAME—JUDGMENT AND OTHER PROCESS.—In such case a decree will be entered against them for the amount so owing and for costs, and payment will be coerced by such other further appropriate decrees and process as may seem proper and necessary.

The facts are fully stated in the opinion.

Henry C. Pindell, for complainant.

Barnett & Noble, for defendants.

BAXTER, J.—It appears from the pleadings in the case that the defendant, Taylor county, issued its coupon bonds to aid in the construction of the Cumberland & Ohio Railroad. These bonds were put upon the market and sold. By the terms of the act under which they were issued the County Court of that county was authorized and required, from time to time, to assess and collect taxes, to be applied in payment of the interest on said bonds as the same matured. But this legal duty thus imposed by law was not performed. The interest not having been paid, the complainants, who were the holders of some of said bonds, brought suit and recovered judgment therefor in this court. On this judgment execution was issued and duly returned *nulla bona*. The county owned no property on which a levy could be made. Thereupon, and upon proper application by complainants, writs of *mandamus*, *nisi* and *peremptory* were issued, commanding the County Court, charged with the duty, to assess taxes for the payment of complainants' judgment; and in obedience to the mandate of this court it made

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and reported said assessment. But the county officers, in answer to said mandate, averred "that, after sincere and diligent effort, it (the County Court) was unable to find any qualified person who would accept the office of collector, give the bond required by law, and undertake to collect said tax."

The court then, as we understand from the statement of the facts made in argument, appointed a receiver, vested with authority and charged with the duty of collecting said tax. But soon after entering upon the execution of his office he was induced by threats of violence to resign his position.

Complainants thereupon filed this bill, to which Taylor county and several of the more prominent tax-debtors thereof were made defendants. Copy of the assessment, as made, is exhibited with, and made a part of the bill, showing the amount assessed against each property holder. Complainants' prayer is that the said several tax-debtors, assessed as aforesaid, be required, by appropriate orders and decrees, to be made by this court in this case, to pay the amounts so severally assessed against them, into court in discharge of their said judgment.

Defendants answer and fully admit the allegations and equity of the bill. This admission is followed by a very frank and manly avowal on the part of the tax-debtors brought before the court, that they are all able, ready and willing to pay the amounts so assessed against them, provided there is some competent person to whom the payments can be legally made. But they go on to suggest and rely upon quite a number of legal barriers, which as they are advised, prevent them from doing so. They insist:

First. That the assessment was not made at the time and in pursuance of the laws providing for the assessment of taxes by the County Court.

Second. If the assessment was valid, there is no privity

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between them and complainants, and hence they deny that, "by reason or virtue of said assessment or levy, or both, they became indebted to said county in the sum so levied, or in any other sum," for complainants' use or benefit.

Third. They contend that by law none but a collector duly appointed, who shall execute bond, etc., is authorized to receive and execute receipts for such taxes; and,

Fourth. They say "that by and under the provisions of the charter of said railroad company," each and every taxpayer "is, upon the payment of such tax, a conditional stockholder of the capital stock of said company to the amount of the tax so paid; that before any such tax-payer is under any legal obligation under said charter to pay any such tax, the collector of such tax shall tender to him a receipt for the amount thereof, and upon such payment said tax-payer can legally demand, and is entitled to receive, from said railroad company, on surrender of such receipt, certificates of stock in said company equal in amount to the tax paid for which a receipt is surrendered; and no tax-payer is under any legal obligation to pay such tax unless thereby he is, by the collection of said tax, armed with the means therefor of becoming a stockholder in said company; and that no collector attempted to be appointed by this court for such purpose could furnish the tax-payer with a receipt therefor, which would entitle him to demand and receive stock in said company."

These defenses are supplemented by repeated and very earnest denials of the power of this court to give a remedy in the premises.

The avowed willingness of the defendants to pay is heartily commended. The justice and validity of complainants' demands are explicitly admitted. The bonds were issued in pursuance of law, at the request and for the benefit of the people of the county. The money realized from the sale of

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these bonds was applied in the construction of a great public enterprise from which they expect to derive pecuniary and other advantages. Of course they are, as they ought to be, ready and willing to pay, and are only restrained from paying because there is, as they are advised, no one legally competent to receive the taxes admitted to be due from them. Their case calls for commiseration. A breach of plighted public faith is a calamity to any community. While it does injustice to the creditor, it dishonors the delinquents. If persisted in it will—slowly it may be, but certainly—contaminate the public morals, and superinduce untold pecuniary and social evils. The willingness, therefore, of defendants to pay, is dictated as well by a sagacious regard for their own interest as by a love of justice and an honest desire to pay their creditors, and they will, I know, be gratified at the announcement that, in the opinion of this court, the legal difficulties, which they by their answer suggest as being in the way of a prompt payment of the taxes assessed against them, are more fanciful than real. The bonds from which the coupons were taken, constituting the foundation of the decree rendered by this court, are valid obligations; at least it has been so adjudicated, and it is now too late for inquiry into that question. The taxes sued for were levied in obedience to the mandate of this court, and this question is *res adjudicata* also. By the terms of the law under which they were issued it is the duty of the County Court to levy and collect a tax from the property of the citizens of the county and apply the same to the payment of the interest, for which complainants have judgment. This was the contract. The pleadings show that the officers of the county sincerely and in good faith endeavored to discharge the duty thus enjoined upon them. But they have been unable to do so. No one competent will give bond and undertake the collection. It is rather an anomaly that, in a community “able, ready and

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willing" to pay taxes to meet its public obligations, no one can be found who is competent and willing, for a just compensation, to collect and apply the same. But such we see, from the record in this case, is the existing condition of things in Taylor county. They would if they could, but they cannot. This court undertook to *lift* them out of their embarrassment by the appointment of a receiver to do what the County Court was, for the reasons stated, unable to do. But by threats of violence he was deterred from performing his duties. As a *dernier resort*, complainants filed this bill, in which they brought some of the tax-debtors of the county personally before the court. The case made brings it within well-established equity jurisdiction. Equity regards the substance of things, and eschews the technicalities of the common law. There is no such privity between complainants and the defendant tax-debtors as would authorize a suit at law. No such privity is necessary to the maintenance of this suit. Under the law it is the legal duty of the County Court to assess the taxes and apply the same in payment of the interest as it accrued on the county bonds. This legal duty imposed on that tribunal a trust for the benefit of the county creditors. But for the reasons stated it could not execute the trust.

Upon this admitted state of the case the complainants have a clear equity to come into this court and invoke its assistance to force the tax-debtors to pay the county, to the end that the county may pay complainants. Such is the theory upon which complainants' equity rests, and which gives jurisdiction to this court. Having on this ground obtained jurisdiction, the court is bound to do full justice, and will, in the exercise of its judicial authority, direct the payment of the taxes so assessed into the registry of the court, to be applied in satisfaction of complainants' decree. Parties thus paying will be acquitted and fully discharged from all further

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liability on that account. There is not the slightest danger that they, or any of them, will ever be called upon to repay the same; and payment thus made will insure to the payers the same interest in the capital stock of the railroad company, conferred on them by the charter thereof, as if made to one acting as county collector. Without pursuing the discussion further, we are of the opinion that the several defenses pleaded and relied on in the answer are untenable and immaterial. They are impertinent, and complainants' exception thereto will be sustained. A decree will be entered authorizing and requiring each tax-debtor to be made a defendant in this case, to pay to the clerk of this court, within ninety (90) days, the amount of tax assessed against him as shown by the copy of the assessment roll filed, and in the event he fails to do so an execution will issue for the same.

If it shall turn out, as it is manifest it will, that the amount due from the defendants is inadequate to pay complainants' decree, and complainants ask for it, another receiver will be appointed and authorized to collect the taxes assessed for the purpose against other property holders of the county, not parties to this cause. They will be allowed reasonable time in which to pay. If they shall not, within reasonable time, pay the sums severally assessed against them, the receiver will be instructed to bring them all before the court by an ancillary petition to be filed in this cause, when a decree will be rendered against each of them for the amount so owing by them, with costs, and collection will be coerced by such further appropriate decrees and process as may seem to the court proper and necessary.

This, we think, may be done by attachment for contempt, or by execution to the marshal for the collection of the same.

It may not be improper to say that this court feels bound, if necessary, to exhaust all its powers in the enforcement of its lawful decrees, and it will not hesitate to exert them.

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LUKE P. BLACKBURN v. SELMA, MARION AND
MEMPHIS RAILROAD COMPANY.CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
DECEMBER 21, 1879.

1. CORPORATIONS—JURISDICTION OF THE FEDERAL COURTS—ESTOPPEL.—A corporation authorized by statute in Tennessee, doing business there and dealing, as if organized, by reciting in its bonds and mortgages that it has been chartered by that State, is estopped when sued in the Federal Courts to deny that it was duly organized under the laws of Tennessee.

2. FOREIGN CORPORATIONS—VOLUNTARY APPEARANCE.—A foreign corporation, by filing an answer waives, the right to be sued only in the districts of the State creating it, and if the suit be in equity to enforce a lien or claim to property within the Federal district where sued, the jurisdiction is not limited to the property situated within the district, but is plenary for all proper purposes after such voluntary appearance.

3. JURISDICTION—PLEADING.—An averment in a bill that a defendant corporation is duly chartered under the laws of Tennessee can only be denied by a plea in abatement to the jurisdiction. A demurrer for want of equity or an answer is a voluntary appearance, although the demurrer may also seek to aver a want of jurisdiction.

4. FOREIGN CORPORATIONS—WHEN FOUND WITHIN THE DISTRICT.—A defendant corporation "is found" within a district where it is sued, whenever it does business there by authority of law; the law implies a condition that it shall be amenable to suit within the State, whether the effect of the legislation is to adopt the foreign corporation as one belonging to the State, or only to license it to do business within the State. An express condition that it shall consent to be suable is not necessary.

5. CORPORATION—WHETHER STATUS HOME OR FOREIGN—JURISDICTION.—It is always a question of legislative intent whether a foreign corporation is adopted as a home corporation or only licensed as a foreign corporation to do business within the State. When the foreign charter is duplicated, and the legislation assumes the form of creating a home corporation, and not the form of a license only, the intention is to adopt the foreign corporation as one of home construction; its effect is to consolidate the two, but for purposes of jurisdiction it is a separate corporation resident within the State of its adoption. In such a case separate organization is not necessary, the foreign organization having been adopted as one existing.

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6. JURISDICTION—COLLUSIVE SUIT.—Where a plaintiff has otherwise a right to sue, it is no objection to the jurisdiction that he acquired the title in question for the purpose of enabling him to bring the suit. A person has the right to acquire property to enable him to sue in the Federal Courts concerning it. But if the transaction is not real, and only colorable, the title, in fact, remaining in the grantor, the jurisdiction is defeated by the statute.

7. CORPORATIONS — CONSOLIDATION — MORTGAGE — JURISDICTION. — Where corporations of three States are consolidated into one, a court of equity in foreclosing a consolidated mortgage upon the entire property, has jurisdiction to sell all the property in all the States. Separate suits are unnecessary. •

8. SUIT PENDING—SUBSEQUENT SUIT—JURISDICTION.—Where by a bill to foreclose a consolidated mortgage a court in one State has acquired jurisdiction to sell property in three States wherein the consolidated company has mortgaged its property, subsequent proceedings to subject the property to other claims in one of the States cannot oust the first court of its jurisdiction to proceed. And a sale of part of the property by such subsequent proceedings cannot avoid a decree for sale in the first suit. Nor can the defendant corporation be heard to set up such subsequent proceedings as a defense to a decree of foreclosure.

9. RAILROADS—REAL ESTATE.—A railroad corporation, when not restricted by its charter, may acquire lands, *ad libitum*, and where it executes a mortgage to secure bonds to be used to raise money for construction purposes, may buy lands with part of the bonds to be utilized by including them in the mortgage as additional security for all the bonds.

10. RAILROADS—SALARIES.—The salaries of the officers of the company are a necessary part of the expenses of construction of the road, and may be paid out of the construction fund, or with the bonds to be used to raise construction funds, unless restricted by the charter.

The company authorized about four million dollars of bonds to be issued to raise money to build the road, and executed a mortgage upon all the property in the States of Alabama, Mississippi and Tennessee, including about forty-five miles of finished road in Alabama. The loan did not attract the money-lenders, and only \$310,000 of the bonds were actually issued. Of these, Gen. N. B. Forrest received \$102,000 in payment of his salary as president, and commissions for procuring subscriptions to the capital stock from counties, towns and private individuals, and for other serv-

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ices rendered the company. A large part of the other bonds were used to purchase of Jacob Thompson, A. M. Clayton, W. G. Ford and others about 250,000 acres of land in Mississippi, known as swamp lands, which were included in the mortgage that authorized their sale by the trustees. A small fund was also raised on the bonds, and used in the construction of the road.

Some of the bonds being sold by Gen. Forrest to Dr. Luke P. Blackburn, now the Governor of Kentucky, that gentleman filed this bill to foreclose the mortgage. Judge EMMONS appointed a receiver, and a deed was made to him, but he never got possession of the Alabama part of the road, because while the motion was pending, a creditor with a judgment for \$75 filed a bill to sell the road, and it was put in the hands of a receiver by the State Courts of Alabama, and subsequently sold.

The corporation was never separately organized in Tennessee; the acts of the Tennessee Legislature being merely duplicates of the Mississippi acts. The jurisdiction of the United States Court was earnestly resisted because it was not a Tennessee corporation, although the principal office was kept in Memphis. The use of the bonds to buy lands and pay salaries was attacked as unauthorized and fraudulent.

Estes & Ellet and *J. W. Hampton*, for the plaintiff.

Minor Meriwether, for the defendant.

HAMMOND, J.—By certain acts of the Legislature of the State of Alabama, commencing February 13, 1850, and on to the latest act of December 31, 1868, there was incorporated a railroad company, finally known as the Selma, Marion & Memphis Railroad Company; by certain acts of the Legislature of the State of Mississippi, from November 23, 1859, to July 21, 1870, there was incorporated by that State a

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railroad company by the same name; and by certain acts of the Legislature of Tennessee, from March 24, 1860, to February 15 and 27, 1869, there was incorporated in this State a railroad company by enacting *verbatim* the Mississippi act of November 23, 1859. The persons incorporated were identically the same, both in Tennessee and Mississippi, and the object evidently was to authorize a consolidated corporation to promote the scheme of building a railroad from the city of Memphis across the State of Mississippi to its eastern boundary. Nothing seems to have been done in furtherance of this enterprise until after the war, when by subsequent legislation the original acts were revived and amended in both Mississippi and Tennessee with the evident purpose of creating, so far as could be done, one single corporation in both States. The incorporators and stockholders met at Okalona, Miss., on the 9th of November, 1868, and organized the company. The stockholders and incorporators resided in both Mississippi and Tennessee. Some of the Tennessee stockholders were delegates from the city of Memphis and Shelby county, Tennessee, and representatives of the Chamber of Commerce at Memphis. At that time the only Tennessee legislation was that of March 24, 1860, but shortly after, on the 15th of February, 1869, the necessary legislation was procured reviving the act of March 24, 1860. There was never any separate organization in the State of Tennessee. The Mississippi and Tennessee legislation seems to be almost identical throughout, the plan being whenever Mississippi passed an act to have it duplicated in Tennessee. The board of directors and officers elected were largely composed of residents of Tennessee. It does not appear when the scheme of consolidating this Mississippi and Tennessee corporation with the Alabama corporation was first conceived, but it may be inferred from the 46th section of the Tennessee act of February 15, 1869, and from the fact that some of the offi-

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cers of the Mississippi and Tennessee corporation were likewise officers in the Alabama corporation; that this consolidation was the one referred to and authorized by the Tennessee Legislature by that act. 'At all events, it appears by the proof that as early as January 30, 1871, the board of directors of the Alabama corporation considered the matter of consolidation by adopting articles of consolidation, which were also adopted by the directory of the Mississippi and Tennessee company March 8, 1871; and by both directories submitted to a joint convention of the stockholders. The proceedings of this convention do not fully appear in the proof, owing, it is said, to the loss of the record of it; but it does fully appear by the testimony that it was held, and the consolidation authorized; that directors were elected for the consolidated company, and that said directors assumed control, and the bonds and mortgages in this case were issued, and recite on their face the fact of consolidation. The consolidated company appears as a defendant in this suit, and by its answer makes defense. This puts the fact of consolidation beyond dispute, as it seems to us, at least, so far as the stockholders of the several companies, whether they be two or three, understood it. If in fact there was no consolidation, it must be because there was some inherent want of power, or some fatal irregularity, to be presently considered.

It is contended by the plaintiff, and no doubt correctly, that a corporation, contracting as such when sued on the contract is estopped to deny its corporate existence, or the regularity of its organization. Nor can it disprove the regularity and sufficiency of the original articles of association; nor thus repudiate its debts. *Herman's Estoppel*, § 542; *Bigelow's Estoppel*, 419, 420; *Field Corp.*, § 386; *Abb. Dig. Corp.* 328, 329, 367; *U. S. Bank v. Dandridge*, 12 Wh. 64; *Zabriskie v. C. C. C. R. R.* 23 How. 381; *Adams v. Memphis*, 3 Coldw. 645; *Dooley v. Cheshire*, 15 Gray, 494;

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Merrick v. Reynolds, 101 Mass. 385; *Priest v. Essex Co.*, 115 Mass. 380. And see *Chubb v. Upton*, 95 U. S. 667. In one of the cases cited, it is said, that "in relation to the question of acceptance of a particular charter by an existing corporation or by corporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence, from which the fact of acceptance may be inferred. It is not indispensable to show a written instrument or vote of acceptance, or the corporation books. It may be inferred from other facts, which demonstrate that it must have been accepted." *Bank of the U. S. v. Dandridge*, 12 Wh. 64, 71.

As we understand the argument of the learned counsel of the defendant, it is claimed that the question here is one of *jurisdiction*, and therefore this doctrine of estoppel does not apply; however, it may be in a case where the defense is *non est factum* or some other plea to the merits. The fact that there never has been any separate organization of a corporation in Tennessee is relied on as conclusive against the jurisdiction, it being argued that without such an organization and acceptance of the charter in Tennessee the charter is dead by non-acceptance and non-user and limitation. *Ang. & Ames Corp.*, § 81. It is said this failure to organize separately in Tennessee shows that the defendant corporation is not a citizen of the district in which the suit is brought, and therefore we have no jurisdiction. *Rev. Stat.*, § 629.

We cannot see why this estoppel is not as conclusive to support the jurisdiction as to support the contract. If a body of citizens shall assume to act as a Tennessee corporation; keep its headquarters and principal officers here, as this did; execute bonds and mortgages, including property lying in Tennessee, and reciting and showing its Tennessee charter and legislation as part of its authority to do those acts, we do not see why it is not estopped by them to deny its

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Tennessee citizenship as well when the jurisdiction of the court depends upon it as when the validity of the contract is called in question. In the *Louisville R. R. Co. v. Letson*, 2 How. 497, 559, it is said that, "when the corporation exercises its powers in the State which chartered it, that is its residence, and such an averment is sufficient to give the Circuit Court jurisdiction." And in this case and the case of *Marshall v. B. & O. R. R.*, 16 How. 314, 328, and subsequent cases, it is held that the members of a corporation are conclusively presumed to be citizens of the State creating it, and are estopped to defeat the jurisdiction by any averment denying it. *Covington Co. v. Shepherd*, 20 How. 227, 233; *Muller v. Dows*, 94 U. S. 444; *Field Corp.*, § 368-376. This shows that the doctrine of estoppel, and the presumption of a fact which may be contrary to the real fact itself can be relied on to support the jurisdiction of the court, as well as for any other purpose. We say, then, that when parties act as a corporation in Tennessee, and claiming to be a Tennessee corporation, deal as such, they are estopped to deny that the corporation is a Tennessee corporation when sued in the Federal Courts of that State, and they can no more aver their non-user or non-acceptance of the charter, under which they have assumed to act against the jurisdiction of the court in which the corporation is sued, than they can aver the fact against the contract itself. But the jurisdiction is supported as well on other grounds. By the act of the 28th of February, 1839, Rev. Stat., § 737, which the cases just cited show to be applicable to corporations, this court can acquire jurisdiction over the corporation by its voluntary appearance, and has done so by the answer in this case. *Jones v. Andrews*, 10 Wall. 327; *Gracie v. Palmer*, 8 Wh. 699. By the act of 1789, Rev. Stat., § 629, the defendant must be a citizen of the State where the suit is brought, but these decisions show that where the constitu-

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tional requirement of being citizens of different States exists the plaintiff may sue the defendant in any district where he is found; that is, served with process, or where he *voluntarily appears*. In *Jones v. Andrews, supra*, a motion to dismiss was held to be such voluntary appearance as waived the right of the defendant to be sued in the district of his residence. It is not necessary to hold here that where the president or other officer of the corporation, on whom process may be served, is found and served in a district other than that of the State creating the corporation, such service will give jurisdiction. Where there is nothing but the presence of an officer of a non-resident corporation in the district to support jurisdiction it would not be acquired by the service of process on him; but with or without the service of process, if a corporation of a State other than that of the plaintiff, being made a party, does voluntarily appear, such appearance gives jurisdiction over the corporation where there are other parties resident within the district who are sued, as in this case. Grant, then, that this corporation is only an Alabama and Mississippi corporation, one or both, being a necessary party to this suit and voluntarily appearing, the jurisdiction over it is complete. It is true that the defendant demurred for want of jurisdiction, and the demurrer was decided against it by the late circuit judge, Emmons, and it seems to us properly, not only upon the merits but technically, upon the record. The bill avers that the defendant corporation was created by the laws of Tennessee, and that the plaintiff is a citizen of Kentucky. This was a sufficient averment and, on the record the jurisdiction sufficiently appeared. *Lafayette Ins. Co. v. French*, 18 How. 404; *Covington Co. v. Shepherd*, 20 How. 227. If the averments were false, the proper way to raise the question and the only way, it seems to us, was by plea in abatement traversing the fact and showing the truth. The learned counsel seeks to avoid

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this by relying on the rule, that the demurrer did not admit "averments of law nor averments of fact in the bill which are contrary to any fact, of which the court takes judicial notice;" for which he cites 1 Danl. Ch. Pr. 546. This averment that the defendant corporation was a corporation chartered by the laws of Tennessee, was not an averment of a matter of law nor an averment contrary to any fact of which we take judicial notice. This very case illustrates that it is not; for, the fact relied upon to defeat the jurisdiction, is that the charter granted "is dead by non-user and non-acceptance and limitation," to quote the language of the brief, and substantially the allegations of the answer. If we admit that we take judicial notice of the Tennessee statutes, creating a corporate body as in the case of *Covington Co. v. Shepherd*, 20 How. 227, 234, we find them in abundance chartering this corporation or one for the same object and same purpose with same name and same parties as the Mississippi and Alabama Corporations; Acts, March 14, 1860, p. 598; February 15, 1869, p. 221; February 27, 1869, p. 345; December 12, 1871, p. 59; March, 1875, p. 48. The fact that no such corporation was ever organized and that the charter was not accepted is one *aliunde* all these statutes, and should have been pleaded in abatement, if relied on to defeat the jurisdiction. 2 Abb. Pr. 55; Conk. Tr. 355; *De Sobry v. Nicholson*, 3 Wall. 423; *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386; *Shepherd v. Graves*, 14 How. 506; *Wickliff v. Owings*, 17 How. 47; *Jones v. League*, 18 How. 76; *Philadelphia, W. & B. R. R. v. Quigley*, 21 How. 202, 214. The filing of an answer, and perhaps the demurrer itself waived it; the demurrer being for want of equity as well as to the jurisdiction. See *Jones v. Andrews*, *supra*. The reservation in the answer of the question of jurisdiction, does not avoid the effect of filing it as a waiver of jurisdiction and a voluntary appearance.

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When the want of jurisdiction appears by the bill, it may be raised by demurrer, otherwise, it must be by plea in abatement, averring the facts relied on. It cannot be taken by answer. It is not like the case of an entire want of jurisdiction of the person or subject matter, which may be taken advantage of at any time. Here the court can by voluntary appearance acquire jurisdiction; and here the record shows a case of jurisdiction on its face. We have considered this question as if it were properly presented on the final hearing; but it is by no means clear that the ruling heretofore made, on this demurrer, belongs to that class of interlocutory orders, which may be reviewed and set aside on the hearing. The decree overruling the demurrer, does not grant leave to rely on it at the hearing, or to take the objection by answer, and this would be, perhaps, the only method of avoiding the necessity of a plea in abatement, if it could be done at all.

Again, we may acquire jurisdiction under the act of June 1, 1872, Rev. Stat., § 738, by reason of the property of this corporation situated within the district and conveyed by the mortgage; and, all that has been said by us on the subject of acquiring jurisdiction by voluntary appearance under the act of February 28, 1839, Rev. Stat., § 737, applies as well to this section. And it is obvious from the reading of the statute that this jurisdiction is not limited to the property within this district, as is claimed by counsel, in any case where there is a voluntary appearance. It is only where there is a decree "*without appearance*" that the jurisdiction is so limited. The act of March 3, 1875, 18 Stat. 470, for the first time in terms confers jurisdiction to the full extent of the judicial power conferred by the Constitution; but it will be found that the courts had already by construction of the acts of 1789 and subsequent acts, extended the jurisdiction to the utmost limits mentioned in the last act upon the subject. It is not therefore neces-

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sary to consider the question, whether the act of 1875 can confer jurisdiction of a suit brought prior to the act itself and which was pending at its passage.

I fully concur with the opinion of the learned circuit judge of the seventh circuit in the case of the *Wilson Packing Co. v. Hunter*, 11 Chicago Leg. News, 207, that in the purview of these acts of Congress a defendant corporation "is found" within this district whenever it does business here by authority of law, and that the license to carry on business implies an obligation to submit to the jurisdiction of the courts of the State in which the license is granted. The Supreme Court have held that such a condition may be attached to the license, and the Federal Courts acquire jurisdiction as well as the State Courts. *Ex parte Schollenberger*, 96 U. S. 369. We have no general statute in Tennessee requiring foreign corporations doing business here to submit to the service of process, although there is such requirement as to foreign insurance companies. Code, § 1500. But the legislation of this State in reference to this company certainly authorizes it to own and operate its railroad within this State and within this Federal district. It does own and, the proof shows, has graded its road either wholly or partly within the district. It kept its principal offices here, and acted in all respects as if it were a Tennessee corporation. Now, whether it was or not, cannot affect the question of our jurisdiction. It may be fairly inferred or implied from the legislation that the company was to be suable here in our courts, if the benefits conferred were accepted as they have been. It is not necessary that the law should especially provide that the company should agree to submit to the jurisdiction of the courts in this State. This is perhaps all that was intended to be decided in the case of the *Railroad Co. v. Harris*, 12 Wall. 65, 81. An act of Congress authorized process against foreign corporations to be served on an agent

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in the District of Columbia, but it did not attach any condition of this kind to the legislation granting the license, but it was implied from the legislation.

More than this, we hold that it was not necessary to have a separate organization in Tennessee in order to make this a Tennessee corporation. We doubt if such was ever the intention of the Legislature; but whether it was or not, it was, in the progress of the legislation, manifestly changed into a purpose to adopt the Mississippi organization as a Tennessee corporation. When this is done no separate organization is necessary to give the company a residence in Tennessee, certainly none is necessary to make it suable here. In the case of the *Railroad Co. v. Harris*, 12 Wall. 65, the legislation of Virginia and of the District of Columbia by Congress was held only to *license* a Maryland corporation, and not to create a Virginia or District of Columbia corporation. Whether the particular legislation does the one or the other was said to be "always a question of legislative intent," p. 83. In the case of the *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 286, an Indiana corporation, licensed by Ohio, sued a *citizen of Indiana* in a Federal Court of Indiana, which was held to be inadmissible. In the *Railway Co. v. Whitton*, 13 Wall. 270, it does not clearly appear what the legislation of Illinois was, but it seems to have been taken for granted that it was of such a character as to make it an Illinois corporation. Yet a citizen of Illinois could sue it in the Federal Court of Wisconsin, because it was a citizen of that State, being also a Wisconsin corporation; and *there* could not be a corporation or citizen of any other State, p. 83.

In *Muller v. Dows*, 94 U. S. 444, the corporations were chartered separately in Missouri and Iowa and subsequently consolidated under the laws of both States; and it was held to be a separate corporation in each for the purposes of jurisdiction. In the case of *Williams v. R. R. Co.*, 3 Dill. 267,

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the defendant was held to be a Kansas corporation, and that it was not by the Missouri legislation made a corporation of that State. The acts of the Missouri Legislature are not shown by the report. From these cases and others it appears that it depends upon the intention of the Legislature in Tennessee whether this corporation is a Tennessee corporation, or only the corporation of another State, licensed to operate within this State. In creating a Tennessee corporation, it might select as corporators citizens of the State or other States, or of both or any number of States, or it might incorporate the same citizens as were incorporated by the other States, and give the same powers, privileges, etc.; or it might only license the foreign corporation to do business here as a foreign corporation. We think on a careful reading of the whole legislation that it was intended to adopt the corporation of Mississippi as a Tennessee corporation, and that while no separate organization was required, yet for the purpose of jurisdiction, a separate corporation was, in fact, created with its *status* fixed as a Tennessee corporation; and for all purposes it was intended to consolidate them to the only extent which can be done under our system. Therefore, the averment of the bill that the defendant was a corporation, created by the laws of Tennessee, is strictly true. But in the face of that averment, if it appear otherwise by the pleadings, as it does here; if the defendant's counsel is correct in his construction of the legislation that the corporation is only a citizen of Mississippi or Alabama or both, the jurisdiction can still be supported, notwithstanding the defective averment, if we are correct in the positions we have assumed on that subject. *Muller v. Dows, supra*. The plaintiff, being a citizen of Kentucky, could sue in the Federal Courts of either State, and our jurisdiction is established.

It is not necessary to consider what the effect of the con-

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solidation is as to the entity of this corporation, whether it is a compact whole or composed of three or two parts, broken by State lines; because, as we have endeavored to show, in any view we can take of the facts, we have jurisdiction to foreclose this mortgage, so far as the parties to the suit are considered in their relation as citizens to each other.

Nor is it necessary to consider this question in reference to the property sought to be foreclosed by decree of sale. The case of *Muller v. Dows*, *supra*, settles the law to be that our decree, if given, may include the whole property in all three of the States where there has been a consolidation, as in this case. *Copeland v. Railroad Co.*, 3 Woods, 651.

The next point to be considered as to the jurisdiction is the allegation, made in the pleadings, that this suit is collusive. It is said Luke P. Blackburn is not the real owner of the bonds sued on by him, but that they were only transferred to him to give this court jurisdiction, and really belong to N. B. Forrest, or his estate; he having died pending the suit, and he being a citizen of Tennessee. There is no proof of this collusive arrangement. It may be that Forrest sold the bonds to Blackburn for the very purpose of enabling him to bring this suit, but that cannot defeat the jurisdiction. It is neither wrong to entertain such a motive nor to carry it out, and certainly not fraudulent. The act of March 3, 1875, 18 Stat. 472, does not avoid a suit because of such a motive. It refers only to simulated and unreal controversies; that is, controversies between citizens of the same State, falsely set up as being citizens of different States. *Barney v. Baltimore City*, 6 Wall. 280; *Smith v. Kernochen*, 7 How. 198; *McDonald v. Smalley*, 1 Pet. 620; *Osborne v. Brooklyn R. R.*, 5 Blatch. 366; *Newby v. Oregon Cent. R. R.*, 1 Sawy. 65; *Briggs v. French*, 2 Sumner, 252; *Willes v. Newberry*, 4 McLean, 226; *Sturling v. Hawkes*, 5 Id. 318. It can make no difference where the

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suit is brought, the law is, or should be, the same in all courts. But if it be different, the real parties to the controversy have a right to select the forum in which to sue. Of course, Blackburn cannot sue on bonds belonging to Forrest, whether it is treated as a question of jurisdiction collusively obtained, or a question of title of the plaintiff. The only fact relied on to sustain this allegation of want of title in the plaintiff, is that he gave Crab Orchard salt stock for the bonds, and it is said the stock was valueless. It does not appear to have been so in the minds of these parties; and it was a good consideration if they thought it valuable.

It is said, the charter did not authorize the purchase of Crab Orchard salts stock by its president. There is no proof that these bonds, sold to Blackburn, belonged to the company, as is assumed in the argument. It seems Forrest owned some of the bonds, and those he sold may have been his own, and in the absence of proof, will be taken to be so.

It appears, by the proof, that this corporation, before issuing these bonds, entered into a contract to purchase, with some of the bonds, certain large quantities of what are said to be "*swamp lands*" in the State of Mississippi; and some of the defendants, who are directors in the corporation, were vendors of the lands, and are now holders of the bonds. This transaction is said to be fraudulent and collusive, made for the purpose of working off worthless lands in return for valuable bonds secured by this mortgage. There is no proof of this whatever. There is not even a syllable of proof taken as to the value of the lands, and we are asked to base a finding that they are valueless on an inference that they are so from the fact that they are denominated "*swamp lands*" and have been forfeited for taxes, and that some of the directors were the owners of some of the lands. If this transaction were fraudulent, it could have been proven to be so; and we do not feel authorized to infer it without proof.

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It is true the courts scrutinize very closely, and sometimes with suspicion the dealings of the officers of a corporation with it. But still, fraud is never inferred from the mere suspicion itself. There must be proof of it, as in other cases.

It seems a fair inference, from the proof, that these lands were purchased and included in the mortgage with a view of thereby strengthening the security and as an auxiliary means of floating the whole issue of bonds on the market. The scheme failed, as many such do; but it is not fair to treat it as a fraud upon the stockholders because it did fail. Many other railroad enterprises failed about this time from general causes, and it may be this did also. Neither can the company refuse to pay these bonds, which it gave for the lands, because of the failure to float the entire loan in the money markets of the world. It took the risk of the transaction, and in the absence of any fraud the contract must be enforced. There is nothing in any of the charters, or acts of the several legislatures under which the company acted, restricting its powers or prohibiting this transaction. In the absence of such restriction, there is no doubt of the power of a railroad corporation to take and hold real estate; and one of the most useful methods of building railroads is by grants of lands, or subscriptions of them to the capital property, to be utilized by sale or mortgage, or otherwise, as the interests of the company may require. It is true the money raised by the bonds was required by the covenants of the mortgage to be used in the construction of the road, and the object of purchasing these lands may have been to so use them as to convert them into money for that purpose. It is to be observed that the mortgage itself includes these lands and provides for utilizing them. If this scheme had been successful, no one would say that the using of a comparatively few thousands of the bonds in buying lands,

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which added strength to the security given for the large loans provided to build the road; would not have been spent in its construction. Of the \$4,250,000 of bonds, only \$184,000 were used in the purchase of these lands. The same may be said about the salaries of the officers. The company might pay its officers out of the construction fund as a necessary expense incurred in the construction. The salaries may have been large, perhaps were too large, but that is no defense against the bonds paid out for them. And, here it may be said that if the purpose was to attack this land transaction as fraudulent, and the payment of these salaries as fraudulent, there should have been filed an original or cross-bill for the purposes of rescision, specifically charging the facts constituting the fraud and presenting the issues directly for adjudication. General charges of this kind, in an answer against co-defendants and bondholders proving their claims in a foreclosure suit, will not do. The plaintiff here is not shown to have had anything to do with these matters. Some mode must be adopted of making the issue with each bondholder as he comes up, where the particular transaction under which he claims, is attacked as fraudulent. There is nothing in the proof to show that the plaintiff, Luke P. Blackburn, got a bond paid out for land or given for salaries. His may have been of those paid out for construction of the road. We cannot infer, because he got it of Forrest, that it was of those paid to him for his salary. We have been asked to embody into a judgment the suspicion of bad faith, entertained by those now representing the company, against those, who formerly represented it, without any direct proof on the subject and on very general charges of fraud. We are asked to assume that "swamp lands" and "Crab Orchard Salts Stock" are valueless, without any testimony as to their real value; to assume that Blackburn's bonds are of those, alleged to be fraudulently issued, and so of the

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other allegations of fraud. Too much has been left to inference in the matter of proving these charges of fraud to enable a court to say that they are true. The land transaction seems to have been ratified, or attempted to be ratified, by special legislation which was designed to further the scheme. We think the powers of the company to mortgage its property included a power to mortgage its franchises. There is no restriction on the subject and much in the legislation, which indicates an intention to include a power to mortgage franchises as well as other property. The mortgage does include the franchises; and it is not for the company to now deny its power in this respect. The incidental power to hold real estate and to mortgage franchises, is adequate unless specially limited by legislation. *Field Corp.* § 52; *Planters' Bank v. Sharp*, 6 How. 332; 2 Redf. on Railways, 462; *Wilson v. Gaines*, Tenn. Sup. Ct., 1 Memphis Law J. 171, 175.

The plaintiff seems to have purchased a bond of Forrest, but, in the absence of proof, we cannot say that it was of the tainted bonds, if any were tainted. It may be that his belonged to the \$16,000 issued for construction purposes. In the absence of proof, we must assume that he was an innocent holder, and therefore it is not necessary to consider the question, whether taking a bond after a coupon is due charges him with notice. This question would only arise, if it were proved that his bond was of those that were issued for the lands or the salaries. The company cannot take advantage of the unauthorized use of the bonds by its agents in violation of their instructions to use them only in construction of the road without proof, showing that the holder had notice that they were so issued. Nothing must be left to inference in determining this question; but the facts constituting the notice must be proved.

By the answer and by an amendment to the answer, filed

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since the cause came on for hearing, certain proceedings in the State Courts of Alabama are set up as a defense to the bill in this case. Technical objections to the consideration of the transcripts, filed as evidence, are made, and in strictness they should not be heard in evidence; but we have, nevertheless, looked carefully into the matter; considered the nature of the defense set up, and feel inclined to dispose of it rather on the merits than the exceptions taken to the irregular mode of its introduction in the record. All these proceedings were taken in the courts of Alabama *subsequently* to the filing of the bill in this case. It seems that one May had a judgment against the road, whether the Alabama corporation or the consolidated corporation does not appear—nor is it material—for the sum of \$76.70, upon which he had a *nulla bona* return. He filed a bill in the State Chancery Court to marshal the assets of the company, and to satisfy his judgment and all proper claims against the company in favor of other creditors, in whose behalf as well as his own, he filed the bill. By this bill he attacked the bonds and mortgage sued on in this case; denied the legal existence of the consolidated company, and set up very much the same defense against them as is set up by the answer in this case. He also attacked by the bill the bonds of the Alabama corporation, indorsed by the State of Alabama, and which were claimed as a prior lien on the Alabama portion of the road which seems to be completed, equipped and in full operation for a distance of some forty-five miles. This lien in behalf of the State of Alabama seems to have been recognized by the mortgage sued on in the case in this court, but its validity is denied by this bill of May in the equity court of Perry county, Alabama. The bill prays for the appointment of a receiver for a sale of the road and a general administration of the assets. At the very time of the filing of this bill, and on the very day, one Porter King, who is president of

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the defendant company, residing in Alabama, appeared by his answer; substantially admitted the equities for the appointment of a receiver; waived notice, and a receiver was immediately appointed and put in possession of the Alabama portion of the road. This was done pending a motion in the case now at bar for a receiver, who was subsequently appointed by the late Circuit Judge EMMONS, and to whom the defendant company by his order conveyed all its property included in the mortgage.

It is manifest that this Alabama proceeding was taken to overreach the jurisdiction of this court and defeat the effect of the proceedings here. It also appears that one Luddington subsequently filed his bill in the Chancery Court of Alabama, claiming to own some of the bonds indorsed by the State of Alabama, and asking to be subrogated to the lien of the State of Alabama for the bonds he held. By an order of the court the receivership in the May bill was extended to the Luddington bill, and the cause went to a decree of sale, recognizing the validity of the lien in favor of the State of Alabama and subrogating the bondholders to the lien. The road in Alabama was sold under the decree, and Crenshaw and others became the purchasers August 12, 1878, and the sale was confirmed to them.

This decree and these proceedings are now set up in this court, not by the purchasers, who are not parties to this suit, but by the defendant company, as a defense against a foreclosure here.

It is manifest that the defendant cannot make such a defense. It has no interest in it, and cannot plead title outstanding in an adverse claimant as a defense to a suit upon other contracts it has made.

But aside from this, these proceedings in Alabama were all taken after the bill filed here and pending the litigation. If in the race of diligence to get possession of the property, by

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collusion of the defendant, or otherwise, creditors appealing to another jurisdiction, have been satisfied, the defendant company has no right to complain. Whether the proceedings, taken there, are binding on creditors, who had, before they were commenced, taken proceedings here to enforce their lien, is a question we are not called on to decide. It is certain that the jurisdiction of this court cannot be ousted by subsequent proceedings taken in another forum, and such subsequent proceedings are not an obstacle to a decree in the court which first acquires jurisdiction. The general rule is that the court, which first acquires jurisdiction, is the one to which all parties claiming an interest in the property, sought to be foreclosed, must resort to settle their conflicting claims. Whether there be circumstances which relieve the creditors proceeding in Alabama from the effects of this rule; whether they might proceed there and acquire a title which is paramount to that claimed by the plaintiff in this suit, is not properly now before us; nor can we undertake, in the condition of this record and with only the parties now here, to determine who will have the better title—the Alabama purchasers or the purchasers under any decree made here. All we determine is that no subsequent proceedings in Alabama can interfere with the proceedings here. We do not understand that actual manual possession of the mortgaged property, by a receiver or otherwise, is necessary to give a court of equity jurisdiction to foreclose the mortgage. A receiver has been appointed here, and a deed has been made conveying the property to him. Whether he ever took possession or not is immaterial; nor do we deem it material whether he got paramount title by the deed. The jurisdiction over the corporation has been acquired, jurisdiction over the trustees in the mortgage has been acquired, and we have jurisdiction to foreclose by sale all the property, included in the mortgage, to satisfy the claims of all creditors coming into this suit.

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Certainly, the defendant company cannot defeat the right to a foreclosure by alleging that some one else may be injured by the sale we make, casting a cloud upon his title.

Let there be a decree in the usual form to foreclose the mortgage.

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CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
JANUARY 31, 1880

WHAT IS FELONY—CHALLENGE PEREMPTORY—UTTERING AND PASSING COUNTERFEIT MONEY.—According to Sec. 819, Rev. Stat., "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty, and the United States to five peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges." The indictment was for making, uttering and passing counterfeit money. *Held*, that this was not a felony within the meaning of the above section.

W. W. Murray, Dist. Att'y, and *J. B. Clough*, Ass't Dist. Att'y, for the United States.

George Gantt, for defendant.

HAMMOND, J.—The defendant, being on trial for counterfeiting the coin of the United States, has peremptorily challenged three of the jurors tendered to him, and claims the right to challenge another, and any number to the extent of

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ten, under Sec. 819 of the Revised Statutes. He insists that the offense of making counterfeit coin is a felony at common law, and therefore a felony in the purview of that section; he also insists that being punishable by imprisonment at hard labor, which necessarily implies confinement in a penitentiary, it is a felony according to the ordinary acceptance of the term in American law; that Congress used the term in that sense in this statute, and did not intend to indicate capital offenses already provided for by the same section of the Revised Statutes.

Sec. 819, above referred to, is as follows: "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges, and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges," etc.

It is apparent that it was here intended to designate by the term "any other felony," other offenses than capital offenses, for they are otherwise specially provided for by this section.

Prior to legislation by Congress this matter of peremptory challenges in the Federal Courts was in some confusion until the Supreme Court declared that they might, by rule, adopt the State practice. *United States v. Shackelford*, 18 How. 588; *United States v. Douglass*, 2 Blatchf. 207; *United States v. Reed*, Id. 435, 447, and note; *United States v. Cottingham*, Id. 470; *United States v. Tallman*, 10 Blatchf. 21; *United States v. Devlin*, 6 Blatchf. 71.

When we could resort to the State practice it was generally found that legislation had accurately regulated the right of challenge by distinctly classifying offenses with such statutory definitions as left no room for doubt. But since Con-

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gress has legislated we can no longer look to the State laws for guidance, nor to the common law, but only to the acts of Congress themselves, which, unfortunately, have only increased the confusion by the use of an indefinite term. I am not advised of any reported case construing this section, nor of the practice in regard to it, except that it is said at the bar that heretofore in this district ten challenges have not been allowed in any case where the offense charged was not, by the statute creating it, declared to be a felony. The first act of Congress, passed March 3, 1865, (13 St. 500,) after providing for treason and capital offenses, as is done by this section 819, provided that, "on the trial of any other offense in which the right of peremptory challenge now exists, the defendant shall be entitled to ten and the United States to two peremptory challenges." The criticism of Judge CONKLING, in the fifth edition of his Treatise, page 632, on this act, demonstrates how indefinite were the terms used, and he concludes that the section was nugatory as to all crimes except treason and capital offenses; because the right of peremptory challenge, he says, only exists in cases of felony, and now nothing is felony except capital offenses. In this criticism the learned district judge of Oregon seems to concur, for he also declares the section nugatory. *United States v. Randall*, 1 Dedy, 524, 548. Yet, strange to say, the act of June 8, 1872, (17 St. 282,) substitutes this word felony for the phrase in the act of 1865 which was thus condemned because it limited the right of peremptory challenges to cases of felony, and thereby left it impossible to determine under the act of 1865 to what cases it should apply. Perhaps a proper construction of the act of March 3, 1865, taken in connection with the law as it then stood under the decision in the case of *United States v. Shackleford*, *supra*, and the act of 1840, 5 St. 394, would have been to look to the State practice to determine in what cases the right of peremptory

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challenge "now exists," and to allow ten challenges in all such cases; for the State practice then furnished not only the rule as to number, but the rule as to the kind of offense in which the right of peremptory challenge existed, as we have already seen. There would have been some certainty in this, but now there is no other course but to determine by the common law what Congress meant in this section of the Revised Statutes by the words "any other felony." If Congress uses a common law term in defining a crime, or in any statute, we must look to the common law for a definition of the term used. 2 Abb. Pr. 171; Conk. Treatise, 178, (5th Ed.); *United States v. Palmer*, 3 Wheat. 610; *United States v. Wilson*, Baldw. 78, 93; *United States v. Burney*, 5 Blatchf. 294, 296; *United States v. McGill*, 1 Wash. 463. The Massachusetts Code commissioners, many years ago, in enumerating felonies within the provisions of their code, in a note, add that the meaning "of the word 'felony' (as by them defined) is limited to the use of the word in this code, and is not to be confounded with the common-law signification of the same term, whatever that meaning may be, for it is a matter of no little difficulty to settle it." Report, title, "Explanation of Terms Cited;" 1 Hale's P. C. (A. D. 1847) 575, note.

The Supreme Court of Alabama said, in *Harrison v. State*, 55 Ala. 239, 241, that it is not easy to determine in all cases what are felonies and *crimenes falsi*. "To predicate of an act," say the Supreme Court of Ohio, "that it is felonious, is simply to assert a legal conclusion as to the quality of the act; and unless the act charged, of itself, imports a felony, it is not made so by the application of this epithet. Indeed, the term felony has no distinct and well-defined meaning applicable to our system of criminal jurisprudence. In England it has a well-known and extensive signification, and comprises every species of crime which at common law

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worked a forfeiture of goods and lands. But under our criminal code the word 'felonious,' although occasionally used, expresses a signification no less vague and indefinite than the word 'criminal.'" *Matthews v. State*, 4 Ohio St. 539, 542. In the constitution of Tennessee the words "criminal charge" are held to be synonymous with "crime," which is said to mean, technically, "felonious offense. *McGinnis v. State*, 9 Humph. 43.

The term "felony" appears to have been long used to signify the degree or class of crime committed, rather than the penal consequences of the forfeiture occasioned by the crime according to its original signification. 1 Archb. Cr. Pl. 1, note; Russ. on Crimes, 43.

Capital punishment by no means enters into the true definition of felony. Strictly speaking, the term comprised every species of crime which occasioned at common law the total forfeiture of either lands or goods, or both. That was the only test. Felonies by common law are such as either concern the taking away of life, or concern the taking away of goods, or concern the habitation, or concern the obstruction of the execution of justice in criminal and capital causes, as escapes, rescues, etc. 1 Hale's P. C. 411. These crimes were of such enormity that the common law punished them by forfeiture: (1) the offender's wife lost her dower; (2) his children became base and ignoble and his blood corrupted; (3) he forfeited his goods and chattels, lands and tenements. The superadded punishment was either capital or otherwise, according to the degree of guilt; that is, the turpitude of the offense. There were felonies not punishable with death, and on the other hand there were offenses, not felonies, which were so punishable. However, the idea of felony was so generally connected with capital punishment, that, erroneously, it came to be understood that all crimes punishable with death were felonies; and so, if a statute created a new

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offense and declared it a felony, but prescribed no punishment, by implication of law it was punishable with death. This has been changed by statute, and now, where a felony is created and no punishment prescribed, it is transportation for seven years, or imprisonment, with or without hard labor, not exceeding two years; and for a second felony, transportation for life. 7 and 8 Geo. IV. The punishment for a misdemeanor at common law was fine or imprisonment, or both, unlimited, but in the most aggravated cases seldom exceeded two years. Tomlin's Dict., title, "Felony;" 4 Black. Com. 94; 3 Inst. 43; 4 Bacon's Abridg., title, "Felony" and title "Forfeiture;" Viner's Abridg., title, "Forfeiture;" 1 Hale's P. C. 411, 574; 1 Archb. Cr. Pr. 1, and note, and p. 185; 1 Russ. on Crimes, 42; 1 Bish. Cr. Law, §§ 580-590; *United States v. Williams*, 1 Cranch's C. C. 178; *Adams v. Barrett*, 5 Ga. 404, 412; *State v. Dewey*, 65 N. C. 572; *United States v. Smith*, 5 Wheat. 153, 159; *United States v. Staats*, 8 How. 41.

Tested by the common law, then, this term has no very exact and determinate meaning, and can apply to no cases in this country except treason, where limited forfeiture of estate is allowed. But technically that is a crime of a higher grade than felony, although it imports also felony. If it be conceded that capital punishment imports a felony, there can be none, at common law, except capital crimes. But that test is untechnical and founded in error. It does not always apply, and it is as arbitrary to say that a crime punished capitally is a felony, as it is to say that one punished by imprisonment in the penitentiary is a felony. Our ancestors brought with them the common-law gradations of crime, as they stood in their day, and although they organized a government which is wholly destitute of a criminal common law, its influence has always prevailed to produce incongruities arising out of an attempt, even when creating new offenses, un-

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known to any law except our own peculiar system, to keep up its gradations of crime. The Supreme Court, in the case last cited, point out the distinction, between the use of the word "felony" as descriptive of an offense, and as descriptive of the punishment; pronounce it the merest technicality, and hold that where a statute creates an offense and declares it a felony it is not necessary to plead a felonious intent. Bouv. Dict., "Feloniously." The court also speak of "the moral degradation attaching to the punishment actually inflicted," and intimate that it is about all that is left to us of the common-law idea of felony. There is just as much of moral degradation in an offense called by the statute-makers a misdemeanor, if punished degradingly, as if with the same character of punishment they call it a felony.

In American law, forfeiture as a consequence of crime being generally abolished, the word "felony" has lost its original and characteristic meaning, and it is rather used to denote any high crime punishable by death or imprisonment. Burrill's Dict., title, "Felony." The term is so interwoven with our criminal law that it should have a definition applicable to its present use; and this notion of moral degradation by confinement in the penitentiary has grown into a general understanding that it constitutes any offense a felony, just as, at common law, the idea of capital punishment became inseparably connected with that of felony. There is, therefore, much force in the suggestion of counsel that since we cannot define this word, as used in this statute, by the common law, it must be understood that Congress used it in this modern sense. Because, where the words of a statute construed technically would be inoperative, but construed according to their common signification would have a reasonable operation, the courts do sometimes adopt the latter construction. Yet it will be found that this modern idea of felony

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has come into general use by force of State legislation on the subject, so far as it is legally established. From a very early day, and as a necessity, the State Legislatures have passed laws defining and enumerating felonies as those crimes punishable by confinement in the penitentiary; and this has come to be the law in nearly every State. In Tennessee the law of 1829 elaborately enumerated felonies, and punishes them with hard labor in the jail or penitentiary, and the act of 1873, chap. 57, makes all crimes, punishable by confinement in the penitentiary, felonies, and so defines the term. C. & N. 316; Acts 1873, p. 87. We have no such legislation by Congress. Section 5391 of the Revised Statutes is limited to offenses committed in places ceded to the United States, and adopts the State law as to such offenses if not otherwise provided for; and, of course, in such cases, if the offense is a felony by State law, it becomes a felony by this section.

There is no uniformity in the legislation of Congress as to the punishment of criminal offenses, and we often find statutory misdemeanors punished more severely than statutory felonies; and while some of the statutes prescribe hard labor as a part of the punishment, when necessarily the confinement must be in some prison where it can be so enforced, on the other hand, the simple imprisonment prescribed may become confinement with hard labor by selecting a prison where it is a part of the discipline; so that we often find prisoners convicted of the same offense, and sentenced to the same punishment undergoing, in fact, different punishments. *Ex parte Karstendick*, 93 U. S. 396. In this case it is held that it is not the intention of our statutes to limit confinement in the penitentiary to those offenses where hard labor is imposed. Rev. Stat. § 5539. We find it, therefore, impracticable to apply any such test as that prescribed by the State legislation above mentioned, as the legislation of

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Congress now stands, to the determination of the meaning of the word "felony" as used in section 819 now under consideration.

But, aside from this, nothing is better settled than that we cannot look to the State laws, in the criminal jurisprudence of the United States, for the characteristic elements which go to make up an offense, and enter into it as a part of its legal *status*; nor to the common law; nor even to the character of the punishment. The Federal Courts take no cognizance of State statutes in criminal proceedings, and deduce no criminal jurisdiction from the common law, which has no force, directly or indirectly, to make an act an offense not made so by Congress; though in all matters respecting the accusation and trial of offenders, not otherwise provided for, we are referred to the laws and usages of the State when the judicial system was organized. 1 Abb. Pr. 197; 2 Abb. Pr. 171; *United States v. Reid*, 12 How. 361; *United States v. Lancaster*, 2 McLean, 431; *United States v. Peterson*, 1 Wood. & M. 306, 309; *United States v. Shepherd*, 1 Hughes, 520, 522; *United States v. Taylor*, Id. 514, 517; *United States v. Maxwell*, 3 Dill. 275, 276; *United States v. Shepard*, 1 Abb. 431; *United States v. Cross*, 1 McArth. 149; *United States v. Black*, 1 Saw. 211; *United States v. Ebert*, 1 Cent. L. J. 205; *United States v. Williams*, 1 Cliff. 5; *United States v. Barney*, 5 Blatchf. 294; *United States v. Watkins*, 3 Cr. C. C. 441, 451; *United States v. Hammond*, 2 Woods, 197; *United States v. Magill*, 1 Wash. C. C. 463.

In those cases where the State laws have been adopted as in section 5391 of the Revised Statutes, they stand as if the act of Congress had defined the offenses in the very words of the State law; and in those cases where Congress has been content to denounce the offense by its common-law name, as in murder and rape, for example, (Rev. St. 5339, 5354,) they

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stand as if Congress had re-enacted the common law *totidem verbis*. And in such cases, unquestionably, if the crime be a felony at common law or by State statute, it is a felony under the act of Congress; and if not punished capitally would fall within the designation of "any other felony," as used in this section 819, by force, not of the common law or State statute but of the Federal statute. Murder is a felony at common law, but it may be doubted if rape is, it having been made so by statute. Merton, 2; 1 Hale's P. C. 226. If this latter offense were not punished capitally, and we were confined, as in some of the States, to the ancient common law, and not that existing at the time of the revolution, it would become a very difficult matter to determine how it was to be ruled under this section 819. This is mentioned to illustrate the almost inextricable perplexity which arises from the use of this word "felony" in the present state of our law, in acts of Congress, without some statutory definition of it.

It does not follow, however, because we can find no common-law definition of this term which will give it and this statute operation according to that law, and are forbidden to adopt the definition found in the modern use of it in State statutes, that this clause of the section is nugatory. The authorities cited show that Congress has the undoubted power to create felonies by legislation operating within the limitations of its jurisdiction over crimes, and that from time immemorial legislatures having general jurisdiction over criminal offenses have added felonies to the common law list. *United States v. Tynen*, 11 Wall. 88. Statutes create felonies either by declaring offenses to be felonies in express terms, or impliedly, as in the ancient statutes, by enacting that the defendant should have judgment of life and member where the word "felony" is omitted, or where the statute says an act under particular circumstances shall be deemed to have been feloniously com-

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mitted. 1 Arch. Cr. Pr. 1, and note; 1 Russ. on Crimes, 43; and authorities above cited. Now, where the common law operates, this declaration, express or implied, entailed the consequences of forfeiture, and if the statute fixed no punishment there was superadded by the ancient law the penalty of death, and now, in England, transportation, and in our American States, confinement in the penitentiary. But it is manifest that the jurisprudence of the United States, as long as section 5326 of the Revised Statutes and other prohibitions of forfeiture of estate and corruption of blood as a punishment for crime continues to be the law, and as long as Congress adopts no general legislation punishing felonies as such, either capitally or otherwise, the declaration that an offense shall be a felony in an act of Congress, is merely *brutum fulmen*, except so far as it inclines the legislative mind to affix a more severe penalty for the commission of the offense. Notwithstanding this, however, it has been, until recent years, the constant habit of Congress to declare offenses created by it either felonies or misdemeanors in express terms, or to leave them to be misdemeanors by making no declaration on the subject. There is no doubt that offenses are felonies when so declared to be, and the accused is entitled, in such cases, where not punished capitally, to ten challenges under this section 819, and this is about the only substantive effect such a declaration has, unless it be that it further gives the accused the right to be proceeded against only by indictment under the fifth amendment to the Constitution; though it has been judicially declared that under our system a felony is not an infamous crime in the sense of that amendment. *United States v. Cross, supra*, and the other authorities above cited. It would seem, therefore, that it is rather to the advantage than the disadvantage of the offender to have Congress declare his offense a felony. Be this as it may, the clause under consid-

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eration may operate, in other than capital cases, to give the defendant ten challenges in the following classes of cases: *First*, where the offense is declared by statute, expressly or impliedly, to be a felony; *second*, where Congress does not define an offense, but simply punishes it by its common-law name, and at common law it is a felony; *third*, where Congress adopts a State law as to an offense, and under such law it is a felony.

It only remains to be determined whether the offense charged in this indictment comes within either of these categories. Making counterfeit coin was by the ancient common law, treason, and subsequently a felony, while uttering or passing it was only a misdemeanor. *Fox v. Ohio*, 5 How. 410, 433; Tomlin's Dict., title, "Coin;" 1 Hale's P. C. 210, 224; *United States v. McCarthy*, 4 Cranch's C. C. 304; *United States v. Shepherd*, 1 Hughes, 521. The act of 1790 (1 St. 115) declares counterfeiting the public securities a felony, and punished it with death. The act of 1825 reduced the punishment to hard labor not exceeding ten years. 4 St. 119. The act of 1806, the first to protect the coin, declared counterfeiting a felony punishable by imprisonment at hard labor. 2 St. 404. The act of 1825 declared counterfeiting the coin a felony punishable with imprisonment at hard labor not exceeding ten years. 4 St. 121. The act of 1873 declared counterfeiting treasury notes a felony, as did the acts of 1847 and 1861. 9 St. 120; 12 St. 123; 17 St. 434. Counterfeiting postage stamps was declared felony by the acts of 1851 and 1853. 9 St. 589; 10 St. 256. Counterfeiting three-cent pieces was by the act of 1865 made a misdemeanor. 13 St. 518.

The Revised Statutes drop this classification, as does the act of 1877, and these offenses are no longer declared felonies. Rev. St. 5414, 5457, 5464; 19 St. 223. And this demonstrates that the legislative will no longer declares this

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offense a felony, and we think the felony feature is impliedly repealed. It is argued very earnestly, however, that the effect of this is only to leave it a felony as at common law. We have already shown that under our system there is no common-law felony unless Congress merely defines a crime which is a felony at common law by its common-law name. If the act said "counterfeiting" shall be, punished as prescribed, it would be a felony; but it does not say so; it defines the offense for itself, and does not declare it a felony for the obvious reason that such a declaration would not change the character of the crime or the punishment, and would be wholly useless. Besides, it would be absurd to punish the misdemeanors of uttering and passing counterfeit coin with precisely the same punishment, all defined in the same section, and then say it was the intention of Congress to give a defendant charged with making the counterfeit ten challenges, and another defendant who passed it only three, while both offenses are defined and punished by the same section and with the same punishment. There is no substantial reason for such a distinction. One crime is just as heinous as the other in the sense of this statute, and they are upon an equal footing.

It is ruled that the defendant can have but three challenges.

See note on this case 22 Alb. L. J. 260. [*Reporter.*]

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MEYER, WEIS & CO. v. GATENS.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—FEBRU-
ARY 11, 1880.

SET-OFF—DISMISSAL OF SUIT BY PLAINTIFF.

The plaintiffs dismissed their suit voluntarily after the defendant had filed a plea of set-off, which is permitted under the statute in Tennessee: *Held*, that the defendant may proceed on such plea as plaintiff, and that the cause will, in such event, be tried as if in the first instance, he had sued on his counter claim.

Motion to reinstate case on trial docket by defendant, seeking in the capacity of plaintiff to recover against plaintiffs (who had dismissed their suit) on his counter-claim.

George Gillham, for defendant.

L. Lehman, for plaintiffs.

HAMMOND, J.—At a former day of this term the plaintiffs dismissed their suit, and now the defendant, who had filed a plea of set-off, moves to reinstate the case upon the trial docket for the purpose of trying the issues made upon his plea of set-off. The Tennessee Code, in the chapter regulating the trial and its incidents, provides that "the plaintiff may, at any time before the jury retires, take a non-suit, or dismiss his action, as to any one or more defendants; but, if the defendant has pleaded a set-off or counter claim, he may elect to proceed on such counter claim in the capacity of a plaintiff." T. & S. Code, 2964. The chapter on pleadings in civil actions, in the article on the plea of set-off, had pro-

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vided that "if the debt or demand so offered to be set off exceed the amount of the plaintiff's demand, such excess being found by the jury, judgment shall be rendered against the plaintiff in favor of the defendant for such excess, and all costs." T. & S. Code, 2922.

In construing this latter section the Supreme Court of Tennessee have repeatedly determined that if the plaintiff fails in his action to establish his claim, so that the judgment is that the defendant owes the plaintiff nothing, the defendant can recover nothing on his set-off, because he is allowed a judgment for the *excess* only. And it has been held that the provisions of section 2964, above quoted, have not changed this rule of decision. Whether this be the correct construction of the statute or not, it is too well settled to be now disturbed by further judicial construction. The Legislature has changed the rule, in actions before a justice of the peace, by amending section 4160 of the Code, and now, in those actions, "if the plaintiff fails in establishing any demands against the defendant, the defendant is nevertheless entitled to have judgment for whatever is due him on his cross-action." Acts 1879, c. 222, p. 265.

This act does not, however, apply to any suits except those commenced before a justice of the peace, and has not changed the rule under section 2922 of the Code. Why this distinction has been made we cannot tell, but in tracing these sections to their originals it will be seen that suits before justices of the peace have always been more favored than others in this matter of the defendant's rights under his plea of set-off, and it is plain this act has followed that distinction. The law, therefore, remains, in regard to this suit, as it stood prior to the act of 1879; so that, if the parties *go to trial* and the plaintiff fails in his action, the defendant can recover nothing on his set-off. *Henry v. Walker*, 11 Heisk. 194; *Baker v. Grigsby*, 7 Heisk. 627; *Railroad v. Galbraith*, 1

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Heisk 482; *Brazelton v. Railroad*, 3 Head, 570; *Edington v. Pickle*, 1 Sneed, 122; *Barnard v. Young*, 5 Humph. 100.

But in all these cases there was a trial before the jury or the justice, and it was held, under such circumstances, that the defendant cannot recover on his set-off if the plaintiff fails in his action; and in none of them did the plaintiff voluntarily dismiss his suit. Where he does this the rule is different, because, by the very terms of the statute, if the plaintiff dismisses his suit before the jury retires the defendant may elect to proceed on his set-off in the capacity of plaintiff. It is precisely this case to which the statute applies, and the decisions above referred to do not affect the question. It was held in *Riley v. Carter*, 3 Humph. 230, that after plea of set-off filed the plaintiff could not dismiss his suit at all; but the Code, § 2964, has changed this, and he may now do so, but with an express provision that if he does the defendant may proceed on his set-off. There is no difficulty in our practice in doing this, for the plea of set-off is in the nature of a declaration on the counter-claim. T. & S. Code, §§ 2918, 2932, 2940; *Ridley v. Buchanan*, 2 Swan, 555, 558.

The case should, therefore, be reinstated on the trial docket, and proceed on the plea of set-off as if the defendant were the plaintiff; but the order dismissing the plaintiff's action should stand as it is, the suit of the plaintiff having been dismissed by himself, as he had a right to do under the statute.

Motion granted.

In re May.

IN RE EDWARD S. MAY.

DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—FEBRUARY 14, 1880.

1. Under Sec. 725 of the Rev. Stat. U. S., a juror in the Federal Court is guilty of contempt in corruptly conferring with a party to a suit during the trial, the court having expressly forbidden the jury to speak to or with any one regarding the case.

2. It seems that he would be guilty of contempt if no such direction were given.

3. The answer of the respondent as to statements of facts, in proceedings for criminal contempt, must be taken as true; but if false the government is remitted to a prosecution for perjury.

4. In such event the answer should not only be credible, but consistent with itself, and if the respondent state facts which are not consistent with his avowed purpose and intention, the court will draw its own inferences from the facts stated.

On motion of the district attorney, who moved for an attachment for contempt of court.

May was duly impaneled as a juror in the case of the *United States v. Sigmund and Feist Rothschild*, indicted with Marcus Burnstine and others for conspiracy to defraud the government. It appearing that respondent had been guilty of misconduct as a juror, an order was issued to show cause why he should not be attached for contempt. On the trial of the cause the jury were cautioned not to talk with, nor allow any person to talk with them, nor should they talk among themselves concerning the evidence or the facts in the cause. On a subsequent day, the court again directed the jury to the same effect, and warned them not to accept treats or hospitalities from any person interested in, or having anything to do with, the case.

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The order to show cause stated that, on the 28th of December, 1879, the respondent did confer and talk with Sigmund Rothschild, one of the defendants, and did allow Rothschild to talk with him concerning the facts and the evidence in the cause; and did also enter into negotiations with Rothschild with reference to the verdict he should render, and as to his affecting by his vote and action in the jury room a disagreement of the jury.

Also, that on the same day respondent went in the night time to the house of Marcus Burnstine, one of the said defendants, but not then on trial, for the purpose of corruptly conferring with said Burnstine, of and concerning the cause, and of and concerning the verdict to be rendered therein, and did then and there talk with said Burnstine and did allow Burnstine to talk with him concerning the facts and evidence in the case and the verdict to be rendered, and also did corruptly negotiate with said Burnstine as to the verdict he should render in said cause. Also, that respondent was guilty of misbehavior in the presence of the court or so near thereto as to obstruct the ends of justice in the facts above set forth.

The answer admitted hearing the orders of the court above referred to, but denies that he violated said orders or conferred with Rothschild or allowed Rothschild to converse with him concerning the facts and evidence in the case.

Respondent further denies that he had any conversation or negotiations with Burnstine whereby for any consideration he would, in declaring his verdict, favor the defendants.

As to the alleged interview with Burnstine, which took place after the arguments had been concluded the night before the charge was given and the case committed to the jury, respondent avers that he is a physician practicing his profession in Detroit, within half a block of Burnstine's resi-

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dence; that on Sunday, the 28th day of December, a man calling his name Miller, residing, as he said, upon Gratiot street, called upon the respondent for professional treatment. That after prescribing for him Miller said to him, "You are a juror in the tobacco trial" and began to talk of the innocence of Rothschild and his standing in the community, when the respondent said to him, most emphatically, that he must not talk in that way to him, as it was against his duty to speak of the case. That Miller then stated that the respondent's conscience was too tender, or words to that effect, and that he could just as well make money out of this; that he himself had been a juror, and got \$250 and nobody ever heard of it. Respondent protested against such talk, and when Miller was going towards the door, the latter said that respondent could make \$400 or \$500, and that he would call again. He further says that he made up his mind to inform the court of the matter next morning, but on further reflection, and remembering the man's statement that he would call again, respondent determined to wait, accept what he might offer him and present it to the court with a public exposure; that on the same day he prepared an envelope and addressed it to the judge of the court, in which he proposed to put whatever should be handed to him by Miller, seal it up and hand it to the court in that condition; that he carried the envelope in his pocket all that week but did not again see Miller; that in the latter part of the week he became anxious about the matter; thought he had neglected his duty in not exposing the matter at first and thought again of speaking to the court but did not from the fact that he had not ascertained positively who the said Miller represented, and that he might be doing a grave injury and injustice to the defendants if it should turn out that he did not represent them, as he considered that the trial was nearly at an end, and that Miller might possibly, if representing an interest

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adverse to the Rothschilds, have taken just that course to prejudice them with the respondent as a juror, and thinking the matter over, he concluded that a man who would want to do a grave injury to Rothschild might have taken the very course that Miller did take to injure him. He further avers that he was clearly of the opinion that he ought not to allow the trial to close without taking some steps in regard to the matter, and on the evening of Sunday, the 28th of November, before it was fairly dark, respondent thinking that if Miller had come from the defendants that Burnstine would know all about it, this respondent could determine the fact as to whom Miller represented by going to Burnstine; that he went up the steps of Burnstine's house and rang the bell. A boy came to the door who asked respondent in, but respondent declined to go in and asked to have Burnstine step to the door; Burnstine came to the door; respondent asked him if he knew him, when respondent said, "Do you know a man by the name of Miller?" believing that from the question being put in that way, if Miller had any privity with Burnstine, the matter would be exposed by Burnstine and he would think respondent came to treat with reference to Miller's proposition. Without answering that directly, Burnstine insisted upon respondent's coming in, which he did and stayed not longer than five minutes, during which the whole conversation turned upon the question whether Miller represented or came from the defendants, which was all that respondent wanted to know. Burnstine said that Miller did not represent them and that he did not know of any such man, but said that Rothschild might, and he would go and get Rothschild. Respondent refused to allow him to go and get Rothschild at all, but said that he simply wanted to know the fact as to whether Miller came from the defendant or not. Burnstine asked respondent what he thought of the case, when the latter at once stated that he could not

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talk with him about that, but simply wanted to know the fact stated and would not stay and converse with him and Rothschild, and told him that he knew nothing about the jury; that he could not get a word out of him, respondent, and that respondent would not talk about the case at all, or as to the way the jury stood. Respondent was about going out, and Burnstine said he was going down to see Rothschild and he would find out whether he knew Miller or anything of him, and asked the respondent if he would call at ten o'clock when he would let him know. He further offered respondent a cigar and a drink which he declined. He did call again about ten o'clock at Burnstine's, when Burnstine, with something of an air of mystery, insisted that respondent should walk through to his office; respondent went in but did not sit down, when Burnstine said that Rothschild knew nothing of Miller at all, and that Rothschild scouted the idea; that he would have nothing to do with buying or corrupting a juror and stated they would not pay a cent to anyone for such purpose, but he said that the matter with regard to Miller was very important as they had no doubt but that Miller represented the other side, and that the defense had been trying to catch some one doing just this thing as they knew it was going on, and he said to respondent that the man called Miller, undoubtedly represented the other side, and asked respondent to point him out in the court room the next morning so that he might be exposed, or to let the lawyers of the defense know whenever respondent could put his eyes on him again and say nothing about it until he was caught; to which respondent assented. He further avers that at both interviews he related the substance of his conversation with Miller, but from the first having the purpose in view of getting Rothschild and Burnstine to admit their connection with Miller, if true. He thinks that he may by his manner have invited a continu-

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ance of the Miller negotiation. In these interviews he became satisfied that neither Rothschild nor Burnstine had anything to do with the man that had approached him, and became thoroughly satisfied that the object the man had was to injure the defendants. He further denies the conversation with Rothschild. He further avers that he made no secret of his going there; went in and out of the front way both times and was not disguised in any manner, and in neither interview did the respondent talk himself nor allow said Burnstine to talk with him about the facts of the case then on trial; that up to that night he had never spoken to Burnstine, nor has he spoken a word to him since. He further denies any contempt, and if his going to Burnstine's house was a disobedience of the order of the court it was not so to respondent's knowledge or understanding of the orders, and he did it for the purest and best motives and for the purpose of serving the ends of justice by exposing fraud and corruption, which it seemed impossible to accomplish in any other way; and if the man who had attempted to corrupt the respondent represented the defense it could have been ascertained in no better way than by respondent in person applying to Burnstine, and he did it with the motive and intention that, if he should fasten the corrupt approach of Miller upon the defense, he would have exposed it the next morning, and he did not think the ends of justice would be subserved to expose the facts otherwise until Miller could be identified. That he did not inform any person of the matter for the reason that he thought a grave crime had been committed and he desired to identify the man and bring him to justice, and he believed that if he did give any information to the court at that late state of the case, there being no time for an investigation, it would simply put the guilty parties upon their guard and might prejudice the minds of the court and jury against the defendants, because the

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respondent would be obliged to state that the man claimed to represent the defense and leave no time to disabuse their minds. He further says that his action in maintaining his position for an acquittal upon the jury, was in accordance with his judgment upon the evidence as confirmed by the charge of the court, and that added to this the information that he had received as before stated, convincing him of indirect methods having been used to influence him, the respondent, impelled him to maintain the innocence of said Rothschild on the jury to the last. He further denies receiving money or any other consideration for his vote upon the jury, and submits his conduct has been free from censure.

S. M. Cutcheon, District Attorney, and *Beakes*, for the Government.

John Atkinson and *Theodore Romeyn*, for the respondent.

BROWN, J.—By Revised Statutes Sec. 725, the power of the Federal Courts to punish for contempts is limited to three classes of cases:

1. Where there has been a misbehavior of a person in the presence of the court or so near thereto as to obstruct the administration of justice.

2. Where there has been misbehavior of any officer of the court in his official transactions; and,

3. Disobedience or resistance of any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the courts. *Ex parte Robinson*, 19 Wall. 505, 511.

It is not necessary here to discuss the question whether in the absence of the express order of the court to the jury to refrain from conversing with any one regarding the case, a juror could be punished for such misconduct. It would

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seem, however, that such misconduct might be reached under the first class of cases as a misbehavior of a person so near the presence of the court as to obstruct the administration of justice therein. The act does not define how near the court the misbehavior must be, nor the character of such misbehavior, and I think it may be fairly construed to extend to any misbehavior by a juror in his capacity as such, since such misbehavior tends to obstruct the administration of justice. Otherwise, it would be impossible for the Federal Courts to punish a juror even for receiving a bribe, since there is no statute making the receipt of a bribe by a juror a crime. The act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials. It seems to me it could not have been the intention of Congress, and I would not infer it to be the intention of Congress, to take away from the courts the common law power of punishing jurors for misconduct. Upon this point, however, I express no opinion, as it is admitted there was an order given, and the only question is whether the respondent has disobeyed it.

It is a cardinal rule in proceedings for contempt that the answer of the respondent cannot be traversed and must be taken as true. If false, the government is remitted to a prosecution for perjury. 4 Black. Com. 287. *In the Matter of Pitman*, 1 Curt. 186; *United States v. Dodge*, 2 Gall. 313.

But the answer must be credible and consistent, and if the respondent states facts which are inconsistent with his avowed purpose and intention, the court will be at liberty to draw its own inferences from the facts stated. *In the Matter of Crosley*, 6 Term Reports, 701; *Ex parte Nowlan*, 6 Term, 118. For instance, if the respondent in this case had stated that, in his interview with Burnstine, he had asked and received a thousand dollars and had kept the

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money in his pocket until after the jury were discharged; and had further stated that he did this for the purpose of delivering the money to the district attorney and prosecuting Burnstine for bribery, it would scarcely be contended that the court would be bound to draw the same inference from his conduct. So, then, it is after all a question in every case, whether the facts stated are consistent with an honest intent.

The prosecution insist, in this case, that Miller was a myth; that respondent's story with regard to his interview with him was concocted solely for the purpose of explaining the subsequent interview with Burnstine. The court, however, cannot accept this theory. I must take it for granted that the interview with Miller was had substantially as stated. Respondent had no power to prevent Miller from conversing with him as he did, and suggesting that money might be made out of the case, but respondent should at once have disclosed the fact to the court, or at least he should not have assumed to take on the character of a detective and work up the case for the government, without consultation with the officers of the government. If, as Miller said, he had been present several days during the trial, he was probably present during some of the days that succeeded his interview with the respondent, and might have been identified. Respondent, however, seems to have made no effort to ascertain whether Miller was in the court room, but keeps the facts to himself, and at the most critical moment of the trial, after the arguments had been concluded, and the evening before the jury were to be charged, goes to the house of one of the defendants after dark, to ascertain whether Miller represented him or any of the other defendants in the case. What business was it to him whether Miller was sent by the defendants or not? Suppose he had been sent by Burnstine, what was the respondent to do about it?

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He was not even content to take Burnstine's word that he knew nothing about Miller but consented to make another visit at a late hour in the evening, in the meantime suggesting to Burnstine to see Rothschild and see whether he knew anything of Miller. The records of the court show that the jury in this case disagreed. It does not, of course, show how they stood, but the respondent in his answer admits that he continued to vote for an acquittal until the end. Suppose a verdict of guilty had been rendered, or, to put the case stronger, suppose it had been a civil case and a verdict had been rendered for the defendants, would it not have been the duty of the court, on respondent's own showing, and to put the most favorable construction upon it, to have granted a new trial on account of his misbehavior? It seems to me entirely clear that it would. Without looking at the affidavits upon which this order was issued and which shows a somewhat different state of facts, it seems to me clear, beyond a reasonable doubt, I might almost say, beyond the shadow of a doubt, that respondent went to Burnstine's house, not for the purpose of detecting Miller or any other person, but rather with the intention of entering into a corrupt negotiation with Burnstine.

The respondent is, therefore, adjudged guilty of the specification charged in the order to show cause, viz.: Going in the night time to the house of one Marcus Burnstine, one of the defendants, for the purpose of corruptly conferring with said Burnstine, of and concerning said cause and of and concerning the verdict thereafter to be rendered therein. And he is further adjudged to pay a fine of one hundred dollars, and to be committed to the Detroit house of correction until the terms of the sentence are complied with.

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WILLIAM M. WHITE v. JAMES MCGARRY, CATHERINE MCGARRY, GEORGE C. BAKER, FRANCES G. BAKER AND NOYES L. AVERY.

CIRCUIT COURT—WESTERN DISTRICT OF MICHIGAN—FEBRUARY 26, 1880.

IN EQUITY.

1. FORECLOSURE OF MORTGAGE—NOTICE—QUIT-CLAIM DEED—RELEASE OF MORTGAGEOR'S INTEREST.—The mere fact that one takes a quit-claim deed does not establish the fact that he is not a *bona fide* purchaser, and consequently such mode, like that by warranty, carries the title which the grantor can lawfully convey.

2. SAME—SAME—PUBLIC RECORDS.—The grantee may rely upon the public records when he has no notice of an infirmity in his grantor's title and pays a valuable consideration.

3. One who merely takes a release of the interest of the mortgageor, whose unrecorded mortgage is outstanding, obtains only the equity of redemption subject to such mortgage.

4. SAME—SAME—BONA FIDE PURCHASER.—In order to constitute the purchaser under the quit-claim deed, in such case a *bona fide* purchaser, he must have paid the purchase money before the discovery of the plaintiff's unrecorded deed.

5. Where a mortgage is produced, showing that it covers certain lands, unrecorded at the time of the purchase of such lands by quit-claim, the burden of proof is on the purchaser of the land to show that he had neither actual nor constructive notice of any such incumbrance.

Stuart & Sweet, for complainant.

Blair, Stone & Kingsley, for defendant Baker.

WITHEY, J.—The case is one for the foreclosure of a mortgage given by James McGarry and wife to complainant of date January 18, 1869, on the northwest quarter and the

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northwest quarter of the southwest quarter of section 25, in town 5, north of range 10 west, covering two hundred acres, and to secure the sum of \$2,000, interest at ten per cent. In recording the mortgage, March 13, 1869, the record was made to describe the quarter section as the "northeast quarter" instead of the northwest quarter, as written in the mortgage. On the 8th day of April, 1876, McGarry and wife, who resided on the premises in the township of Caledonia exchanged the said northwest quarter covered by the mortgage, with defendant George C. Baker, who resided at Stanton, in Montcalm county, Michigan, for other premises; McGarry and wife conveying to Baker the 160 acres by quitclaim deed, Baker also conveying to them the property which they were to receive.

The deed to Baker was recorded the same day, and he went into possession a few days thereafter. On the 200 acres was another mortgage to W. D. Foster given subsequent to the one to complainant, amounting to about \$2,400. Baker defends against complainant's mortgage on the ground that he had no notice actual or constructive of its existence. The testimony is conflicting. It may be said that complainant's evidence, standing alone, makes out a case of actual notice to Baker. On the other hand it can also be said that the evidence on the part of defendant Baker, considered by itself, establishes the fact that he had no notice whatever, until after he had paid to McGarry and wife the entire purchase price going to them. He bought subject to the Foster mortgage, which he assumed to pay. The evidence cannot be reconciled upon the question whether defendant Baker, prior to the exchange of deeds and entry into possession, had such notice as put him upon inquiry concerning complainant's mortgage.

It will subserve no useful purpose, in this opinion to enter upon any extended review of the testimony. When com-

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plainant produced his mortgage, the burden of proof was on defendant Baker to make a *prima facie* showing that he had neither actual nor constructive notice of any such incumbrance. This he did by proving that the public records of the county disclosed no record of such mortgage. He had a right to rely upon the records. The burden of proof was then cast upon complainant to show either that Baker had actual notice of complainant's mortgage, or that which put him upon inquiry in reference to it. Whatever may be said of the testimony, it cannot be reconciled and applied so as to afford a solution of the difficulty, and we are forced to the conclusion that complainant has failed to make a case that Baker had notice either of the existence of complainant's mortgage or of anything to put him upon inquiry.

It is insisted that as Baker was a purchaser by quit-claim deed, he is not to be regarded as a *bona fide* purchaser without notice, that a quit-claim passes the title as the grantor held it and the grantee occupies the same relation to the property as did the grantor. To support this view we are referred to *Oliver v. Piatt*, 3 How. 410; *May v. LeClaire*, 11 Wall. 232; *Villa v. Roderiguez*, 12 Wall. 338. We have considered the effect of the rule laid down in the cases referred to and are of the opinion that in neither of them did the court intend to lay down the broad doctrine asserted by complainant's counsel. The question of the effect produced by recording laws is not touched by either of the decisions. In transactions where no question of recorded titles is involved the rule to which reference has been made, would apply, but in our opinion it does not apply when there are recording laws. The statutes of Michigan provide that "Every conveyance of real estate which shall not be recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, whose conveyance shall be first duly recorded." 2 Compiled Laws, section

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4231. The term "conveyance" is declared to embrace every instrument by which any estate or interest in land is created, aliened, mortgaged or assigned. Section 4237. Again, section 4205 says: "A deed of quit-claim and release of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale." That a purchaser accepts a conveyance by a quit-claim deed, is a fact that may, and should be taken into consideration, in determining whether he was a *bona fide* purchaser without notice.

It is not believed to be the law that the mere fact that one takes by a quit-claim deed establishes that he is not a *bona fide* purchaser. A conveyance by quit-claim, like that by warranty deed carries the title which the grantor can lawfully convey, and the grantee may rely upon the public records when he has no notice of an infirmity in his grantor's title and pays a valuable consideration. The covenants of warranty in a deed are contracts by which the grantor becomes liable in case of failure or defect in title, though such deed will no more convey title when the grantor had none, than will a deed of quit-claim. It is not seen why one who purchases by a quit-claim deed has not as much right to rely upon the record of titles as though he took by a warranty. If the cases cited by plaintiff's counsel touch this question, still we are unwilling they should control the case we are considering; to do so would, in our opinion, extend them beyond the facts upon which they rest.

We agree to the view urged by counsel, that one who takes merely a release of the interest of the mortgageor, whose unrecorded mortgage is outstanding, obtains only the equity of redemption subject to such mortgage; 1 Jones on Mortgages, section 598; *Eaton v. Trowbridge*, Michigan Lawyer, April 1878, 343.

The rule is, also, that the purchase money must have been

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paid at the time of the discovery of plaintiff's unrecorded mortgage in order to constitute Baker a *bona fide* purchaser. Baker, at the time he learned of the existence of plaintiff's mortgage, had paid the purchase price going to McGarry by a conveyance of his property.

The incumbrance subject to which he bought, Baker had in part paid, and he was therefore not in condition to be placed in *statu quo*. There is nothing to show that he could receive back what he had parted with, or be made whole.

Complainant is entitled to the usual decree of foreclosure and sale as to 40 acres, described as the northwest quarter of section 25 in town 5 north, of range 10 west; but the 160 acres, described as the northwest quarter of the same section will not be included in the decree.

CRANE, BREED & BREED v. THE CITY INSURANCE COMPANY OF PITTSBURG.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—MARCH, 1880.

1. **CONTRACTS OF INSURANCE—CONSTRUCTION.**—Contracts of insurance are to be construed as other contracts. The rule is that all parts of the contract are to be taken together; they shall be liberally construed, and such meaning be given to them as will carry out and effectuate to the fullest extent the intention of the parties, and that no portion of the contract will receive such a construction as will tend to defeat the obvious general purpose of the parties entering into it.

2. **INCREASE OF RISK.**—Where there is a provision against increase of risk—it does not mean any use of the property by defendant by which liability to fire may be increased to any extent—but it means an essential increase of risk.

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8. ALTERATIONS AND REPAIRS.—A permission in the policy to the assured to make alterations and repairs incidental to the business, does not mean all alterations which the parties might desire to make connected with the carrying on of business, but only such as would not essentially and materially increase the liability of the property to be destroyed by fire.

4. AGENT'S RELATIONS TO THE COMPANY AFTER DELIVERY OF THE POLICY.—After the policy is delivered by the agent effecting the insurance to the company, his relations to it are changed, and it would not be bound by any knowledge by him afterwards acquired in relation to alterations or repairs.

The facts are fully stated in the opinion.

Hoadly, Johnson & Colston, for plaintiffs.

Moulton, Johnson & Levy, for defendant.

SWING, J.—This action is brought by the plaintiffs to recover the sum of \$794.40 upon a policy of insurance, issued by defendant to the plaintiffs on the 9th day of November, A. D. 1879, insuring plaintiffs against loss by fire upon a two-story brick house, used by them as a manufactory of packing boxes, burial cases, etc., in Cincinnati, Ohio.

The plaintiffs aver substantially, the payment of the premium, the issuing of the policy of insurance and damage by fire to the property, to the amount of \$794.40. That due notice and proof of loss was made, and that plaintiffs have kept and performed all their conditions of said policy, and pray judgment for \$794.40.

The defendant answers substantially, that after the making and delivery of the policy, it became null and void, because, by the terms of the policy it is provided, that if the premises therein described shall be occupied or used, so as to increase the risk, or if the risk be increased by any means whatever, within the control of the assured, without the consent of the company indorsed upon said policy, it shall be void. That

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without the consent of the company so indorsed, the plaintiff did increase the risk, by the sinking of an artesian well on said premises, in the sinking of which a vein of gas was struck, which coming in contact with a gas jet near by caused an explosion and set fire to the building. That in the sinking of said well plaintiffs were engaged in an unusual and extraordinary undertaking, not customary or necessary to the business they were carrying on, and materially increased the risk and hazard of fire in violation of the policy, and by which the policy became void. By reason whereof they deny liability upon said policy.

The plaintiffs by reply, deny generally the allegations of the answer, and allege that by the terms of the policy they had a right to make alterations and repairs incident to their business, which was that of manufacturers of undertaker's goods, heating apparatus, etc., and that the sinking of said artesian well, was an alteration incident to said business, within the meaning of said policy. And further that the agent of the Insurance Company had full knowledge that the plaintiffs were boring said well, and made no objections thereto; and that the statement in the proof of loss that the well had reached 267 feet, is not correct, but it should be 230.

Three issues are presented by these pleadings. The first is raised by the answer of the defendant, and is substantially that the plaintiffs, without the consent of the defendant indorsed upon the policy, increased the risk by sinking an artesian well upon the premises insured, and that by the sinking of the well gas was struck, which, coming in contact with a gas jet, caused the burning of the building insured.

The second is, that the sinking of the well was embraced in the clause of the policy permitting alterations incident to the business; and the third is, that the agent of the defendant

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had notice of the sinking of the well while the work was progressing, and made no objection thereto.

It may be said generally that contracts of insurance are to be construed as other contracts. And among the most important rules for their construction is that all parts of the contract are to be taken together; and they shall be liberally construed; and that such meaning shall be given to them as will carry out and effectuate to the fullest extent the intention of the parties, and that no portion of it will receive such a construction as will tend to defeat the obvious general purpose of the parties entering into the contract.

Applying these general principles to the construction of this contract generally, and to the particular clauses brought especially to our notice by the pleading, we may say the general object and purpose of this contract was to secure the plaintiffs against loss by fire upon a certain described property, then in use for particular purposes described in the policy, and that this insurance was effected by the insurance company upon said property upon the condition that the property and its use should not be essentially and materially changed; and applying the rules to the particular clause pleaded by the defendant, the language of which is: "If the above mentioned premises shall be occupied or used so as to increase the risk, * * * or if the risk be increased by the erection of or occupation of neighboring buildings; or if by any means whatever within the control of the assured without the consent of the company indorsed hereon"—if we give this clause its literal and restricted meaning, any use whatever of the premises by the defendant, by which the liability to fire was increased to any extent, would avoid the policy, but this would not be in accordance with the rules of construction we have laid down, and it could not be said that such was the sense in which the parties understood and used them at the time of the execution

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of the contract. We think, therefore, that the terms "increase the risk," must be construed as meaning an essential increase of risk.

And so applying the same rules of construction to the clause of the policy relied upon by the plaintiffs, to-wit: "The insured has permission to make alterations and repairs incidental to the business"—if we give this clause its literal meaning, it would be extended to embrace all alterations which the parties might desire to make connected with the carrying on of the business, although it might increase, to an unlimited extent, the liability of the premises to be destroyed by fire. But such a construction would not be in accordance with the rules already alluded to, and certainly could not have been the sense in which the parties understood them at the time. I think, therefore, that this clause must be understood as embracing such alterations in relation to the carrying on the business of the plaintiffs as would not essentially and materially increase the liability of the property to be destroyed by fire.

If the jury find from the evidence that the sinking of the well was without the consent of the company, and materially and essentially increased the liability of the property insured to be burned, the policy would be avoided and the defendant will be entitled to your verdict.

But if the sinking of the well did not materially and essentially increase the liability of the property to be burned, it would not avoid the policy, although its effect may have been to render it in some degree more liable to be burned than it otherwise would have been.

If you find from the evidence that in the business in which these premises were used a well would be beneficial, and such well as the plaintiffs sunk had, prior to and at the date of the policy, been sunk, and was in common use by establishments of the general character of the plaintiffs, and the sink-

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ing of such well did not essentially and materially increase the liability of the premises to be burned, the plaintiffs had the right to sink the well, and the sinking thereof would not avoid the policy.

Upon the question raised by the reply that the agent of the company, having knowledge of the digging of the well, and making no objections, the assent of the company is to be presumed, I may say to you that although Mr. Young, an insurance agent, placed the insurance in the defendant's company, and procured the regular agent of the company, Mr. Pollack, to issue the policy, after the issuing and delivery of the policy to the plaintiff, Mr. Young's relations to the company ceased, and the company would not be chargeable with any knowledge of his, acquired after that time in regard to the sinking of said well.

KELLEY v. MISSISSIPPI CENTRAL RAILROAD COMPANY.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—MARCH,
1880.

1. SERVICE ON CORPORATION—EXTINCT CORPORATION.—Where the representative of a railroad corporation is served with process, he may plead in abatement in his own name that the corporation is extinct; or he may make the same defense by motion to dismiss the suit, or by suggestion of his attorney on record, supported by affidavits showing the facts.

2. AGENT MAY DENY HIS RELATION TO THE CORPORATION BY THE SAME PLEA.—Where a person is so served with process he may, by plea, deny that he sustains any such relation to the corporation as authorizes the service of process on him.

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The marshal was commanded to summon the Mississippi Central Railroad Co., a Tennessee corporation, to answer in a suit brought to recover \$7,000 on past due coupons of said company. The officer served one L. T. Bryan, described as manager, John G. Mann, superintendent, and R. P. Neely, a director of said company. Each of these parties file a separate plea in abatement, two of whom deny they ever had any connection with, or that they sustain the relation to, said company as set forth in the return of the marshal. Neely admits there was formerly such a corporation in existence, but avers that it ceased to exist by reason of a consolidation thereof, under proper authority, with the New Orleans, St. Louis & Chicago Railroad Company. He further states that at one time he was president and director in said corporation, and is now a director in the consolidated company, and sets forth all the facts relied upon to show a dissolution of said company. The pleas were all sworn to. Plaintiff moved to strike them out for the reason, as he alleged, that the persons filing them were not parties, and for judgment by default. Parties pleading moved that their pleas be treated as affidavits in case they are not permitted to plead in abatement, and also to quash the writ; and should this be not agreed to, their counsel ask that they may be permitted to appear as *amici curiæ* for the purpose of suggesting and proving such facts as will show that judgment by default should not be entered against them.

Humes & Poston, for the plaintiff.

James Fentrees and Wright, Folkes & Wright, for defendants.

HAMMOND, J.—The only question to be now determined is, whether the persons named in the marshal's return shall

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be allowed to plead. The question here raised usually arises in some collateral way, and when it has been directly presented, as in this case, the courts are always beset with technical difficulties. On the one hand it is urged that a dead party cannot speak; that a non-existing thing cannot, without admitting the very question in dispute, plead in the manner it might if it did exist; while on the other it is said with equal force, that one not a party to a suit cannot be heard to interfere with it. In *Bronson v. LaCrosse R. Co.*, 2 Wall. 283, 292, it is said that generally other persons are not permitted to plead for a corporation, because of the inequality that would exist between the parties. The corporation not being before the court would not be bound by any judgment rendered on such pleas. But lest there should be a reproach to the law, stockholders were permitted to plead for themselves, where the corporation had abandoned its defense and its trust.

Every corporation has officers who speak and act for it by authority of law, and process must be served on the proper officer or the judicial proceeding is not binding. *Alexandria v. Fairfax*, 95 U. S. 774. Under the Tennessee Code a failure to elect officers does not dissolve corporations, and those last in office continue, and process may be served upon them; so, after dissolution, they continue for five years for the very purpose of prosecuting and defending suits. T. & S. Code, secs. 1481, 1493, 2831, 2834. If the defendant here has a qualified existence under these provisions of the statute, there should be a plea by the corporation itself. In the absence of such statutes, the tendency of modern decisions is to treat a corporation once existing as continuing to exist for the purpose of suing and being sued in winding up its affairs. *Pomeroy v. Bank*, 1 Wall. 23; *R. Co. v. Evans*, 6 Heisk. 607; *Shackelford v. R. Co.*, 52 Miss. 159.

But we are met at the threshold with the question whether

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this defendant exists at all for any purpose, as a question of fact to be ascertained in determining whether the plaintiff is entitled to a judgment by default. He insists that he has the right to take his judgment, at the peril of its being void if there be in fact no corporation. In England there can be no judgment by default without appearance, and if the defendant refuses to appear, the plaintiff must enter appearance for him, and in doing so, must make affidavit of proper service on the defendant; this may be contested by cross-affidavits and motions to quash the service and the writ. 3 Chit. Prac. 264, 277, 280. In Alabama and other States the court will not give a judgment by default against a corporation, without a judicial finding, recited on the record, that the service has been of a character to bring the corporation into court. *Oxford Co. v. Spradley*, 42 Ala. 24; *Talladega Co. v. McCullough*, Id. 667. But we have no such reasonable requirements in Tennessee. The sheriff may simply return the process "executed," and the presumption is that it is regular, and on the proper officer. Any party aggrieved has his remedy by action for a false return against the sheriff, or by bill in equity to set aside the judgment. *Wartrace v. Turnpike, Co.*, 2 Coldw. 515; *Ridgeway v. Bank*, 11 Humph. 522; *Bell v. Williams*, 1 Head, 230; *Baxter v. Ervin*, Thomp. Cases, 175; *Gardner v. Barger*, 4 Heisk. 669, 671. But even in Tennessee one is not put to an action for a false return or a bill in equity to avoid a wrongful judgment. In *Graham v. Roberts*, 1 Head, 55, a writ against Garret Graham was served on Jared Graham and the bill in equity of the latter to avoid the judgment was dismissed, because he did not appear to contest the judgment by default in the first instance. In *Bank v. Skillern*, 2 Sneed, 698, a judgment by default was set aside on the affidavit, and in *Jones v. Cloud*, 4 Coldw. 236, 239, on the motion of one not a party to the record; and in both cases

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it was held not to be error. No Tennessee case has been found which shows how the alleged extinction of a corporation may be contested in a suit against it in its corporate name; and until modified by the statutes above cited, the law was settled, that upon the civil death of a corporation it could no longer sue or be sued, and could have neither officers nor stockholders; and the same would doubtless be the rule under these statutes after the five years of qualified *post mortem* existence have elapsed. *White v. Campbell*, 5 Humph. 37; *Hopkins v. Whitesides*, 1 Head, 33; *Ingraham v. Terry*, 11 Humph. 571; *Blake v. Hinkle*, 10 Yerg. 217; *Nashville Bank v. Petway*, 3 Humph. 522. It is said in *R. R. Co. v. Evans*, 6 Heisk. 607, that the question of extinction must be raised "by a plea in abatement, motion or other proceeding," but there is nothing to indicate by whom these may be taken. In this case, and uniformly, it is held that a failure to make the question by some proper proceeding admits the corporate existence. The necessity, then, for some proceeding to abate the suit is obvious. If there be any appearance, except to make that contest, the matter is ended in favor of the existence, for afterwards all parties are estopped to deny it. *Muscatine v. Funk*, 18 Iowa, 469. The marshal cannot safely assume to determine the question and refuse to execute the writ, particularly in a case like this where there has been a corporation which has issued bonds and built a railroad, and as to which there are outward and tangible evidences of continued existence.

The plaintiff may take a judgment at his peril, and if there be no corporation, it is void, as we have seen. *Thornton v. Railway*, 123 Mass. 32. But I do not see that he is entitled to this as a matter of right, nor that the stockholders or others interested should be compelled to submit to such a judgment without a preliminary contest over the fact of corporate existence; because, if there be a corporation,

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the judgment by default is binding, and all opportunity to make other defenses is gone. This throws on all interested the peril of determining the important question of existence for themselves, without the aid of judicial inquiry into the disputed facts, and is an immense advantage to a plaintiff; and it would, in my opinion, be a reproach to the law to permit it upon any technical theory that the officers and stockholders are not parties, and therefore cannot plead in the suit. That they are not parties even when served with process cannot be denied. *Bronson v. LaCrosse R. Co.*, *supra*; *French v. Bank*, 7 Ben. 488, S. C. 11 N. B. K. 189; *Apperson v. Ins. Co.*, 38 N. J. L. 272; *Blackman v. R. Co.*, 58 Ga. 189.

How, then, can the defense be made? It is said in *Oxford Co. v. Spradley*, 46 Ala. 98, that there is no precedent for a plea by a corporation of its own non-existence, that it is an inappropriate plea and an inconsistency in itself; but it is intimated in *McCullough v. Ins. Co.*, Id. 376, that such a plea is permissible in cases of misnomer and dissolution. In *W. U. Tel. Co. v. Eyser*, 2 Col. 141, Mr. Justice BELFORD says that such a plea by the corporation itself is not anomalous, and is abundantly established by many respectable courts, and he concludes it is a plea in bar and may be joined with the general issue; but the majority of the court held it could be pleaded by the corporation neither in abatement nor bar, that such a plea was *felo de se*. See, also, *Gulf R. R. Co. v. Shirley*, 20 Kas. 660. Notwithstanding this it will be found that the plea has been made by the alleged corporation itself in many cases. *Foster v. White Cloud*, 32 Mo. 505; *Hobich v. Folger*, 20 Wall. 1; *Boyce v. M. E. Church*, 46 Md. 359; *Greenwood v. Railroad Co.*, 10 Gray, 373; *Dooley v. Gloss Co.*, 15 Gray, 494; *Thornton v. Railway*, 123 Mass. 32; *Gatt v. Adams Exp. Co.*, 100 Mass. 320; *Inman v. Allport*, 65 Ill. 540; *Pilbrow v. Railway Co.*, 5 M. G. & S. (57 E. C. L.) 440.

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In Massachusetts it is held that the plea must be by the corporation, and that an officer or stockholder cannot make defense. *Townsend v. Free Will Baptist*, 6 Cush. 281; *Byers v. Franklin Co.*, 14 Allen, 470; *Robbins v. Justices*, 12 Gray, 225. Yet in *Buck v. Ashuelot Co.*, 4 Allen, 357, and *Foster v. Essex Bank*, 16 Mass. 245, the fact of non-existence was otherwise made to appear in the one case by one having no right to plead, and in the other by suggestion of counsel.

In *Callender v. Painesville Co.*, 11 Ohio St. 516, the question was directly adjudicated. An officer not even served with process, was allowed to file his affidavit and move to dismiss the suit, because the defendant had no corporate existence, the court holding that he was not an intruder; that a judgment against the company would be against all the members collectively, including him as an individual, and that any member under the circumstances, might make the motion to dismiss and be heard upon it. And in *Pilbrow v. Railway Co.*, 54 E. C. L. 780, the right of the person served to make the defense was upheld. See, also, *Stevenson v. Thorn*, 13 M. & W. 149; *Stewart v. Dunn*, 12 Id. 655.

The defense was made by the persons served with process pleading in abatement in *Rand v. Proprietors*, 3 Day, 441, *Evarts v. Killingworth Co.*, 20 Conn. 447, and *Express Co. v. Haggard*, 37 Ill. 465; and in *Elliott v. Holmes*, 1 McLean, 466, it was held that a person served with process against another might make the defense either by such plea or suggestion of counsel. In *Quarrier v. Peabody Co.*, 10 West Va. 507, it is said that a plea in abatement by a corporation should not be by attorney, but by the president individually, to avoid the effects of appearance by the corporation; that a corporation should never plead in abatement in its corporate name.

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Persons sued in a representative capacity as executors, trustees and the like, may plead that they hold no such relation. 1 Danl. Ch. 631; Story Eq. Pl. 732. This is quite analogous to the situation of the parties here. It is true, executors are parties to the writ, but only in their representative capacity; and where they plead "no such executor," it is their individual plea. So the head officer of a corporation sued as such may deny that he sustains that relation. *Stewart v. Dunn*, *supra*; and in *Stevenson v. Thorn*, *supra*, it was said that a person served with process is, for some purposes at least, to be considered the defendant. And there is another analogy in the case of a judgment of outlawry, where, if the outlaw dies, the death may be pleaded by any person to release his property. 1 Tidd. 144. The defense of the non-existence of a corporation, sued as such, may also be made by an attorney in his own name suggesting it on the record. *Greely v. Smith*, 3 Story, 657; *Munma v. Potomac Co.*, 8 Pet. 281; *Pomeroy v. Bunk*, 1 Wall. 23. Whether he be the attorney of the corporation must depend on whether it exists or not; if not, he must be the attorney of some one else having an interest in the matter, for a non-existing corporation can not in the nature of things appoint an attorney under a common seal, and the dissolution would revoke any appointment already made.

The objections suggested against any method of making the defense come from pressing too far the doctrine that a corporation has an independent existence. This *ens rationis* called a corporation is, after all, only an incorporeal defendant, and it cannot, until its existence is established, have any independent *status* separate and apart from the personality of those composing it. To speak of it as dying is a somewhat false analogy. The law provides heirs, executors or administrators for dead persons; but an extinct corporation must be represented by the individuals who originally com-

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posed it; they may employ attorneys, and, as a matter of fact, they are the real actors in any litigation with it; if it be alive, they must act in the corporate name; if extinct, they may so act, although it would be an inconsistency, or they may act in their own names. If sued in the corporate name, this would seem to violate the well known rule that none but parties can plead; but this results from assuming the very question in dispute in favor of the plaintiff, *i. e.*, that there is a corporation. If the question be assumed the other way, as the persons alleged to have a corporate existence must assume if they deny that fact, there is no difficulty in treating them as the real parties sued. The plaintiff here by his argument requires the court to adjudicate that a corporation does exist upon his bare allegation of the fact; and he would compel the persons supposed to constitute it, to admit that fact by pleading in the corporate name which he assumes they have. I do not think the rule of pleading relied on is so inflexible as to give the plaintiff this advantage. Either this case is an exception to it, or, for the purpose of trying this question, the persons alleged to be incorporated must be considered the real parties, notwithstanding the plaintiff's assumption of their corporate capacity.

In *Welch v. St. Genevieve*, 1 Dill. 130, the facts were presented by the return to a *mandamus* of individuals held to have no official connection with the corporation, and upon the suggestion of an *amicus curiae*, the question of extinction was tried. In *McGoon v. Scales*, 9 Wall. 23, the defense was made both by trustees not sued, and the extinct corporation itself; and in *Bank v. Colby*, 21 Wall. 609, the motion to abate was made by a receiver.

The plaintiff having treated the persons served with process as representing the alleged corporation, he cannot preclude them from at least denying that there is such a corporation. Whether they do this in their own names or that

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of the alleged corporation is quite immaterial, but it seems to me more reasonable not to pretend that there is a corporation in order to deny that there is one.

The motion to strike out the pleas and for judgment by default is denied.

LEACH, ASSIGNEE, ETC., v. KAY.

CIRCUIT COURT—DISTRICT OF KENTUCKY—MARCH, 1880.

1. CLERK'S COMMISSIONS.—The clerk of the court is allowed one per centum for receiving, keeping and paying out moneys under Rev. Stat., sec. 828. Unless the money has actually or constructively passed through his hands, he is not entitled to such commission.

2. ASSIGNEE IN BANKRUPTCY—COMMISSIONS OF CLERK.—There is no statute requiring an assignee in bankruptcy who has sold real estate and subsequently filed a bill in the United States Circuit Court to settle conflicting claims to the property, to pay proceeds received in the registry of the court. The clerk is entitled to no commissions in such moneys, unless an order has been made to pay the money into court.

On exceptions to clerk's costs.

I. R. Puryear, for himself.

I. W. Bloomfield and *Henry Burnett*, for plaintiff.

HAMMOND, J.—This was a bill in equity to settle a controversy between the creditors of different firms, to which the bankrupts belonged, as to the distribution of the assets. It is in the nature of a bill of interpleader by the assignee, though, perhaps, not technically such, to settle questions of

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title to certain property in his possession, claimed as assets by him, which claim was disputed by creditors demanding the property as assets of a firm not bankrupt. By the decree it was adjudged that the property belonged to the bankrupt firm, and should be distributed equally among all the creditors of that firm. The assignee had, as the proceeds of the sale made by him, the sum of \$9,000, and the clerk insists that it was constructively in the registry of the court; that he is entitled to the commission of one per centum allowed him by section 828 of the Revised Statutes, and he has so taxed it in his fee bill.

The assignee excepts to this on the ground that the money belonged to him as assignee, and was never in the registry as a fact, nor could it properly belong there. Undoubtedly, in a proceeding like this, whether one of the parties be an assignee in bankruptcy or not, or whether he claims the property in dispute in that capacity or not, it is competent for the court to order the money to be paid into the registry, or to appoint a receiver of it as in other equity cases. But neither the final decree nor any interlocutory order has made such disposition of the money. It is insisted by the clerk, however, that it is constructively *in court* because the assignee is distributing it under the orders of the court, or holds it as if paid to him by the court here, and therefore it should be considered as having been paid by him into the registry and returned to him through it. The final decree shows that this is a misapprehension of it. After adjudging *the property*, which was a warehouse, to the assignee, it goes on to say, "to be held and distributed as such, [assets of Sebree & Hobson, the bankrupts,] in bankruptcy, *in and by the District Court of the United States*, * * * in the matter of Sebree & Hobson, bankrupts, through the register before whom said case is pending in bankruptcy."

It is therefore being distributed in the District Court, and

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not this court. But, aside from this, the bankrupt law provides that the assignee shall deposit the money *in his own name as assignee* in some bank, and does not contemplate that he shall pay it into the registry. Revised Statutes, 5059. It can never go there, except by some order of court making that disposition of it, as in ordinary cases of litigation, for satisfactory reasons appearing in the suit in which the order is made. In the case of *Ex parte Prescott*, cited by the clerk, there was an order that the marshal deposit the money in bank, subject to the order of the court, and though it was not in the registry, but in the name of the marshal in a bank, Mr. Justice STORY held that it was, in legal intentment, deposited in court, and allowed the clerk his fees. 2 Gall. 145; 1 Bright Dig. 274, and note. And so, in *The Avery*, 2 Gall. 308, the same learned judge held that where it was the duty of the marshal to pay a fund into court, upon a sale *pendente lite*, the clerk was entitled to his commissions, although if the sale had been made on final decree the marshal could himself distribute it. The case *Ex parte Plitt*, 2 Wall. jr. 453, decides that the clerk is not entitled to commissions "for receiving, keeping, and paying out money," unless the money has actually passed through his hands, or into the custody of the court, or has been agreed to be so considered.

In re Goodrich, 4 Dill. 230, it was held that the statute implies that the money shall be actually received, kept, and paid out by the clerk, and that, generally at least, even where a fund is ordered to be paid through the clerk, the parties may disregard the order and pay directly, and deprive the clerk of his commissions. And see *Upton v. Treblecock*, 4 Dill. 232, note. I doubt if I should go so far as was done in *Goodrich's Case*, if it appeared that there was a combination between the parties to make the payments so as to defeat the clerk's commissions. However, this case clearly

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falls within the rule that the clerk is not entitled to commissions unless the money passes through his hands, either actually or constructively. It was not the duty of the assignee, under any statute or other law, to pay the fund he held into this court, nor was he even ordered to do so. The item of \$90, charged by the clerk, must be, therefore, disallowed.

COSTS—WITNESSES.—LONGYEAR, J., in *Mass. Life Ins. Co. v. Fisher*, (MS.) Detroit, February, 1874, ruled, viz.: The travel fees of witnesses attending in court from distances beyond the reach of a subpoena cannot be taxed against a losing party. The mileage of witnesses attending from out of the district and more than one hundred miles from the place of trial can be taxed only for one hundred miles; citing 1 Cranch. 178; 2 Story, 199; 3 id. 84; W. & M. 63; Hemp. 546; 5 McLean, 213, 241; 1 Fish. Pat. C. 285; 2 id. 244; 5 Blatch. 184; 1 Abb. 299; 4 Ben. 357; 4 Fish. P. C. 633; and 6 Blatch. 509, as being all the cases relating to the question. [Reporter.]

LUCIEN B. EATON v. NOBLE CALHOUN.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—MARCH,
1880.

ON DEMURREE.

1. JURISDICTION IN FEDERAL COURT CO-EXTENSIVE WITH THAT IN STATE COURT—WHEN.—By virtue of sec. 25, act of March 3, 1875, original jurisdiction is conferred on the Circuit Court concurrent with the courts of the several States of all suits of a civil nature at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and which arise under the Constitution or laws of the United States.

2. NECESSARY AVERMENTS.—Parties suing in this court must, however, show by proper and apt averments enough to maintain the Federal jurisdiction according to this rule.

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The grounds of demurrer are fully stated in the opinion of the court.

Lucien B. Eaton, in *propria persona*, for plaintiff.

Jos. M. Gregory, for defendant.

BAXTER, J.—The defendant, by demurrer, denies the jurisdiction of this court, on the ground that both the plaintiff and himself are citizens of Tennessee; and this is the only question presented for our determination.

The framers of the Constitution seem to have been agreed upon three fundamental ideas: First, that a national judiciary was essential to the maintenance of the national authority; second, that its powers should be co-extensive with those of the legislative department; and, third, that it ought to be so organized and endowed as to insure all the purposes of its establishment. And in furtherance of these principles they made the Constitution declare "that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority." But this Constitution needed legislation to make it effective. Hence the 25th section of the Judiciary Act of 1789, prescribed a mode whereby parties claiming rights under the Constitution or laws of the United States, could, after unsuccessfully litigating the same through the State Courts, have the judgments or decrees of the State Courts against them re-examined and reversed or affirmed by the Supreme Court of the United States.

But this remedy was found to be circuitous, dilatory and expensive. To obviate which, Congress passed the act of March 3, 1875, entitled, "An Act to Determine the Jurisdiction of the Circuit Court," etc. This act, in explicit terms, confers original jurisdiction concurrent with the courts of the several States "on the Circuit Courts of the

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United States of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States." Parties, therefore, claiming rights under the Federal Constitution or laws, may, since the act of 1875, pursue the remedy given by the aforesaid 25th section, or in lieu thereof, bring their suit, in the first instance, in the Federal tribunals. But they must, in either case, show by proper and apt averments, enough to maintain the Federal jurisdiction. Does the plaintiff do this in this case? If he does we are bound to retain and try the cause.

Upon this point the plaintiff, after alleging title, etc., to the premises sued for, says that he acquired his title "through a deed of the United States executed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, by virtue of the authority conferred by the act of the 8th of June, 1872, and acts amendatory thereof," and that his "claim of title arises under the aforesaid acts of Congress," and that "the validity of said acts of Congress and his title thereunder, are the only questions in controversy" in this case.

These averments, admitted by the demurrer, bring the case within the purview of the act of 1875, and clothes the court with jurisdiction in the premises. The demurrer will therefore be disallowed and defendant will be permitted to plead in bar. The district judge concurs.

This case was first tried by HAMMOND, J., before whom counsel insisted that the jurisdiction could not be maintained under the act of 1833, referring to that alone. Not being satisfied as to how the law was, his honor ordered a re-argument, but, before the time fixed, came to the conclusion that the act in question was not broad enough for such a case, and prepared an opinion, (MS.) On the day assigned for re-argument he consulted with BAXTER, J., who coincided in that view, but suggested, as he did afterwards to counsel, that perhaps the act of 1875 covered the case, on which question the re-argument proceeded. The result was the foregoing decision [Reporter.

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DISTRICT COURT—DISTRICT OF KENTUCKY—MARCH 4, 1880.

ACTION IN REM BY SEAMAN AGAINST OFFICER OF BOAT.

A seaman cannot, by a proceeding *in rem*, join a claim for wages with a claim for an assault and battery by an officer of a vessel.

The libellant claimed for services as seaman on voyage to New Orleans and return. On the voyage back, he alleged, when near Caseyville, Ky., he was stricken by the mate, with the knowledge and consent of the captain—badly used and then put off without his consent. He further claimed wages, rations and fare back home, in addition to a large sum for damages by reason of the assault, which, he alleged, resulted in sickness, lameness, and a total unfitness for work. The exception to the libel was, that the claims, being for tort and contract, cannot be joined.

I. H. Trabue and *L. N. Dembitz*, for libellant.

Barr, Goodloe & Humphrey, for claimant.

BROWN, J.—The only question raised by the exception is whether a seaman, in an action *in rem*, can join a claim for wages with a claim for an assault and battery by an officer of the vessel. Doubtless a court of admiralty may entertain jurisdiction *in personam* of suits for assaults, and I see no reason to doubt that a seaman may join in an action for wages a claim against the vessel for injuries received by such acts of negligence as the ship is liable for in a proceeding

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in rem; but, by general admiralty Rule 16, "in all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only."

It seems to be the opinion of Mr. Benedict, however, (Benedict's Admiralty, sec. 309,) that this rule is confined to cases technically for assault and battery as mere torts, and that if the action be brought on a contract, as for not carrying a passenger safely, or without injury, or for not treating with kindness a passenger or seaman, an assault or beating being the gravamen of the breach, that the suit may be *in rem* against the vessel. No authorities, however, are cited to this proposition, and upon a careful examination I have been unable to find any which lends it support. It is true there are certain cases *in rem* in which the libellant may join any number of demands, and in cases *in personam* claims *ex delicto* and *ex contractu* are not infrequently joined in the same libel. Dunlap's Admiralty, 89.

The question here involved is discussed in but a single case, viz., *Pratt v. Thomas*, 1 Ware's Rep. 427, in which the learned judge for the district of Maine considers the subject with his usual thoroughness, and comes to a conclusion that a claim for damages for a personal wrong is an entirely independent claim, and perfectly unconnected with that for wages. This case is a much stronger one against a joinder than the one at the bar, as it was a libel *in personam* against the master.

If it had been supposed that the court could entertain jurisdiction *in rem* of a suit for an assault, it is incredible that precedents for such suits should not be found in the books, for cases of aggravated assaults upon seamen are of the commonest occurrence. Upon the contrary, in all reported cases of this kind the actions are *in personam* only. *The Agincourt*; 1 Hagg. 271; *The Lowther Castle* Id. 384;

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The Enchantress, Id. 395; *The Ruckers*, 4 Rob. 73; *Chamberlain v. Chandler*, 3 Mass. 242; *Peterson v. Watson*, Blatch. & How. 487; *Thomas v. Gray*, Id. 493; *Treadwell v. Joseph*, 1 Sumn. 390; *Williams & Bruce's Adm. Pr.* 61; *Butler v. McLellan*, 1 Ware, 219; *Forbes v. Parsons*, Crabbe, 283; *Fuller v. Colby*, 3 W. & M. 1; *Anderson v. Ross*, 2 Saw. 91.

Doubtless a seamen is entitled to be cured of his wounds at the expense of the ship, and to his wages during his sickness; and I know of no reason why libellant might not have joined a claim of this kind with one for wages. 2 Pars. on Ship. 80-85; *The Lillie Hopkins*, 1 Wood, 170; *The Bradish Johnson*, Id. 301; *The D. S. Cage*, Id. 401; *The Ben Flint*, 1 Biss. 567. His claim for damages, however, is rather for the pain and suffering endured than the expense of cure; in other words, it is a claim for an assault and battery, and not for wages and medical attendance.

An act of Congress, making the damages occasioned by assault of officers upon seamen a lien upon the ship, may be the only effectual means of checking the brutality and inhumanity so frequently seen on shipboard, but I am satisfied that the law at present warrants no such method of procedure.

The exceptions must therefore be sustained.

Equitable Trust Co. v. Christ et al.

EQUITABLE TRUST COMPANY v. GUSTAV
CHRIST, ELIZA CHRIST AND OTHERS.

CIRCUIT COURT—WESTERN DISTRICT OF MICHIGAN—SOUTH-
ERN DIVISION—MARCH 13, 1880.

IN EQUITY.

1. **FIXTURES—BREWING ESTABLISHMENT.**—Where tubs, vats and casks are too large to pass out of a building through any opening existing, these and all other such articles, must be regarded as placed there with the design of permanent use therein. They are fixtures and pass by sale with the realty to the purchaser.

2. **ARTICLES ESSENTIAL, ETC.**—Where articles are essential to the use for which a building is erected or designed and are specially adapted to that place but not specially adapted to any other place, they should be regarded as parts of the freehold. A building is often the mere incident for the use of machinery or utensils. The unity between machinery or other things and the building affords often a solution of the question of what passes as a fixture.

Order to show cause why defendants should not be enjoined, etc.

Mr. Rogers, opposed to injunction.

Mr. Ferris, for injunction.

WITHEY, J.—Complainant bid in certain real estate under foreclosure sale on which was a brewery establishment. Before the decree of foreclosure was obtained defendant, Gustav Christ, executed a bill of sale to defendant Leppig of certain property as personal and not part of the freehold or fixtures, comprising among others the following: two large vats or

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tubs, in cellar; one cask, in cellar; one mash tub, one water tank, two fermenting tubs, one large force-pump, one copper cooler, one wooden cooler, one small force-pump, copper conductors and a bar counter.

There were other articles, but, as I regard them, they were personal effects belonging to one of defendant Christs, or to Leppig, as the case may be, possessing none of the characteristics of fixtures, and may be regarded as not covered by the order in this case.

Where the tubs, vats and cask are too large to pass out of the building through any opening existing, and these and the other articles I have mentioned are placed in the building with the design of permanent use therein, my opinion is that such articles are fixtures and pass with the building to the purchaser.

If articles are essential to the use for which the building was erected or designed and are specially adapted to that place and not as specially adapted elsewhere, they should be regarded as part of the freehold. Often a building is the mere incident for the use of machinery or utensils. The unity between machinery or other things and the building affords often a solution of the question of what passes as a fixture. 26 Grattan Va. 752.

Let an order be entered to restrain the removal of the articles enumerated in this opinion.

Engleman Trans. Co. v. Longwell et al.

ENGLEMAN TRANSPORTATION COMPANY v.
JAMES M. LONGWELL AND OTHERS.

CIRCUIT COURT—WESTERN DISTRICT OF MICHIGAN—SOUTH-
ERN DIVISION—MARCH 23, 1880.

IN EQUITY.

1. MORTGAGEE—ACCOUNTABILITY FOR RENTS.—A mortgagee in possession of the undivided one-half of property is not accountable for rents if unable to lease it or there has been a failure, after judicious leasing, to collect rent.

2. SAME—COURT OF EQUITY—USE.—But where a partnership has been entered into to use the property with another and the venture turns out disastrous, a court of equity will not inquire under such circumstances whether there was profit or loss, but a fair rental value will be charged over repairs, insurance, etc., and taxes paid.

Question as to accounting.

Names of counsel do not appear.

WITHEY, J.—Mrs. Longwell, one of the defendants, a mortgagee in the possession of the undivided half of premises, the conveyance being absolute in form, has been required to account for the net rents and profits. It turns out that she has received from one of the two parcels of real estate no rent, and claims therefore that she is not chargeable with rent.

The title of an undivided half of the property, upon the face of the records of the county where the property was situated, was in Mrs. Longwell; defendant Sherman owned the other half. She gave him a mortgage on her half to secure one-half of the costs of repairs which he made on

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one parcel of the property; Sherman agreeing to carry on the business of milling and flouring for five years from September 1875, and pay to Mrs. Longwell one-quarter of the net profits, she to bear one-half of the losses if any.

Her quarter of profits Sherman was to apply towards paying her share of the advances made by him, secured by the mortgage on her undivided half. The business of milling proved disastrous, instead of a profit there was a loss; consequently there was no reduction of the mortgage given to Sherman.

Now it is claimed that Mrs. Longwell is not chargeable with any rents whatever as she received none. We regard this view to be a misapprehension of the rule under the facts. Mrs. Longwell, as mortgagee in possession of the undivided one-half of the mill property, would not be accountable for rent if she had been unable to lease the property or had failed, after judicious leasing, to collect rent; but when she entered into a partnership arrangement with Sherman to do a milling and flouring business with this mill property, (the rule would be the same if she had alone carried on the business,) and the venture turned out disastrous, a court of equity will not inquire under such circumstances whether there was profit or loss, but will charge her with the fair rental value of the premises over repairs, insurance, etc., and taxes paid.

The master is therefore directed to ascertain what the fair net rental value of the undivided half of the mill was during the period of the accounting, in the condition it was after the improvements were made, and credit her with the cost of her share of the improvements beneficial to the freehold.

Dodge v. Fuller et al.

JARED P. DODGE v. HETTIE FULLER ET AL.

CIRCUIT COURT—WESTERN DISTRICT OF MICHIGAN—SOUTHERN DIVISION, MARCH 27, 1880.

IN EQUITY.

1. FORECLOSURE—REDEEMING AN OUTSTANDING MORTGAGE BEFORE PROCEEDINGS END IN COMPLETE FORECLOSURE.—Where a mortgagee redeems the land after a sale upon foreclosure proceedings under advertisement as provided by law, he becomes assignee of the mortgage, and is entitled to enforce it as such, and to have the same rate of interest as the mortgage bore.

2. EFFECT OF REDEMPTION IN SUCH CASE.—The effect of the redemption in such case is to cancel the sale and, as the complainant in foreclosure proceedings is under no obligation to pay off the mortgage, the payment will not be treated in equity as operating to discharge the same.

WITHEY, J.—The bill in this cause was filed to foreclose a mortgage made by the defendant Hettie Fuller to the complainant's assignee, William P. Hall, and also a certain mortgage executed by the same defendant to John Marley and from which the complainant was compelled to redeem, for his protection, after a sale had been had upon foreclosure proceedings, instituted by advertisement under the statute.

The complainant claims that this redemption put him in position of assignee of the mortgage, and it becomes necessary to determine whether the position taken by complainant is correct, as if he is entitled to enforce the mortgage as assignee he will be entitled to interest at the rate per cent. which the mortgage bore, viz.: ten per cent., while if on the other hand he is simply entitled to an equitable lien for the money paid on redemption he must content himself with the

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legal rate of interest, as equity cannot go so far as to make a contract for the parties, fixing the rate of interest.

There is no question that had the redemption occurred before any proceedings were had to foreclose the mortgage given to Marley, the complainant would have become in equity the assignee of such mortgage. Jones on Mortgages, sec. 1086; *Mattison v. Marks*, 31 Mich. 421.

It remains to be determined whether any different rule obtains where proceedings to foreclose have been taken, which have not terminated in a complete foreclosure by the expiration of the equity of redemption.

Section 6922 C. L. of 1871 provides, in effect, that in case of redemption after sale, the deed given on the sale, shall be void and of no effect.

We think that the effect of the redemption by complainant was to annul the sale, and that as the complainant was under no obligation to pay the mortgage, such payment will not in equity be treated as operating to discharge the same, but that, as in case of redemption before any proceedings to foreclose are taken, he will be treated as assignee of the mortgage lien.

It follows that he will be entitled to interest upon this mortgage at the rate of ten per cent.

Let a decree be entered in accordance with these views.

United States v. Evans et al.

UNITED STATES v. R. L. D. EVANS, W. R. EVANS
AND H. B. WILSON, ADM.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
MARCH 29, 1880.

1. DEFENSE TO *SCI. FA.*—RECOGNIZANCE—SUFFICIENCY OF BOND.—Defendant gave a recognizance to appear and answer a charge for passing counterfeit money, which was forfeited: *Held*, that he could not afterwards assert by way of defense to *sci. fa.* upon such recognizance the fact of the indictment being defective. The law in Tennessee is that where a bond or recognizance would have been good at common law it will be deemed in any proceeding, where the question may be raised, a sufficient statutory bond.

2. WHERE CLERK TAKES BOND ON DAY THAT COURT SITS—PRESUMPTION.—Bail bond was executed before the clerk, who wrote at the proper place, "signed, sealed and acknowledged and approved by" himself. There was nothing in the record to show that the defendant was brought before the clerk for examination and bail as a magistrate. It did appear, however, that the court was in session that day: *Held*, that the presumption was that the bond was taken by the clerk under the direction of the court, and that while courts have an inherent power to take recognizances, clerks can do so by virtue of statute only.

Evans was twice indicted for passing counterfeit money. There was a mistrial when his case was put before a jury on May 30 and 31, 1878. The jury being discharged, the defendant brought forward his sureties and entered into a recognizance for his appearance at November term, 1878, before the clerk, who had not up to that time, been appointed one of the commissioners of the court. The judge, holding court, gave an order that the same should be executed in the clerk's office, which was in a room adjoining. Judgment *nisi* was taken on the bond on January 20, 1879, and *sci. fa.* issued. Service was executed on W. R. Evans only; the other defendants were not found.

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The attorney for the government and the defendant agreed to the facts as above set forth, and, further, that judgment might be pronounced as though an *alias* writ had issued and was returned not found, as to R. L. D. Evans. They further agreed that one of the obligors was dead, and that his administrator was in court for all proper purposes. And, further, that if the *sci. fa.* should be quashed on motion, or the *sci. fa.* be held bad on demurrer or on plea of *nul tiel* record, or motion in arrest, judgment might be rendered for defendants; otherwise, against them.

Wm. W. Murray, assisted by John B. Clough, appeared for the United States.

Emmerson Etheridge and J. McFarland, represented the defendants.

HAMMOND, J.—This is a *sci. fa.* upon a forfeited recognizance submitted upon the foregoing agreed statement of facts and the record of the proceedings in the case. It is first insisted by the defendants that the indictment is bad in not charging the offense to have been committed on a particular date. The caption is “May Term, A. D. 1876,” and the offense is alleged to have been committed “on the — day of —, A. D. 1876.” It is urged that for this defect, upon conviction, the judgment would be arrested. Whart. Cr. Law, sec. 264. It is denied for the plaintiff that this case falls within that rule, if, indeed, such defense can be made to the *sci. fa.*, which is also denied.

I express no opinion on the sufficiency of the indictment, for, conceding it to be defective, and fatally so, it is, I think, no defense to this *sci. fa.* In the first place the bond did not bind the defendant to answer this indictment, but only a “charge against him for passing counterfeit money.” He was bound to appear to answer the charge, whether upon

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this indictment or some other indictment, or information to be preferred against him. His appearance at court was the thing to be secured, and a further condition was that he should continue in attendance until discharged by the court. He cannot abscond, forfeit his bond, and on the *sci. fa.* try collaterally the merits of the case upon the sufficiency of the indictment or other matter of defense. The defendant and his sureties would, by such practice, be allowed to judge of the propriety and utility of his appearance, which cannot be permitted. *State v. Adams*, 3 Head, 259; *State v. Rye*, 9 Yerg. 386; *United States v. Reese*, 4 Saw. 629; *United States v. Stein*, 13 Blatchf. 127; *State v. Stout*, 6 Halst. 124.

The defense most relied on is that the clerk had no authority to take this bond, and, having no authority, the *sci. fa.* must be quashed. It is argued that this *sci. fa.* must speak by the record, strictly pursue it, and show by it the validity of the bond; that it was taken by a competent officer, and all the jurisdictional facts to support his action; that by this record it appears that the clerk, as of his own authority, took this bail bond, because the minutes of the court do not show that he took it by order of the judge sitting either as an officer authorized to hold to bail, or as a court acting under its general powers in the premises; and that inasmuch as the clerk is not named in the Revised Statutes, secs. 1014, 1015, as an officer authorized to hold to bail, the bond is void. In support of this position many authorities are cited showing how strict the practice was that the *sci. fa.* must be based on a record showing all the essential jurisdictional facts to support the validity of the proceedings and justify an award of execution. *State v. Edwards*, 4 Humph. 226; *State v. Austin*, Id. 213; *State v. Cherry*, Id. 232; *State v. Smith*, 2 Me. 62; *Bridge v. Ford*, 4 Mass. 641; *People v. Kane*, 4 Denio, 530; *State v. Edgarton*, 7 Rep. 122, (Boston, 1879;) Foster's Sci. Fa. 279.

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It is to be observed, however, that in Tennessee, since the above cases, these niceties of practice have been abandoned by legislative direction. Act of 1852, c. 256, T. & S. Code, sec. 5155. By this section "every bond or recognizance deemed good and valid as a common law bond shall be a good statutory bond, and no defense to any action, or *sci. fa.*, prosecuted to enforce such bond or recognizance, shall be available unless it would be a legal and valid defense to a suit at common law upon the same." The Federal Courts are bound, in this matter of taking bail in criminal cases, by the State laws, by express command of the statutes. Rev. St. secs. 1014, 1015 and 716; *United States v. Rundlett*, 2 Curt. 4144; *United States v. Horton*, 2 Dill. 94, 97. This Tennessee act of the Legislature has been construed to be a new dispensation, designed to abolish those "dry technicalities," which were said to have operated as "a judicial pardon to offenders," and to have put statutory bonds and recognizances upon an equal footing with common law bonds. *State v. Quinby*, 5 Sneed, 418.

I think the effect of it is to make this voluntary obligation, however taken, filed in court to secure the release of one of the obligors, binding to all intents and purposes, as if taken by a proper officer. I do not wish to be understood as holding that one arrested, and under duress to find bail or stand committed by an officer having no authority to hold to bail, can be lawfully bound to bail upon the judicial determination of an unauthorized officer; but only that, by the operation of this statute, on the agreed facts in this case, this is a voluntary bond, filed of record and accepted by the court having power to take it, and which binds these defendants as if it had been, in all respects, a proper statutory bond or recognizance.

By the influence of the same principle, without any statute, it was held, in *McLean v. State*, 8 Heisk. 22, 235, that the

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approval of a tax collector's bond by a tribunal which had no legal existence, and whose acts were void, did not release the sureties. It was a voluntary obligation, accepted by the State and acted on by all parties, and they would not be heard to say it was taken by an improper officer.

Here the court had power to take a bail bond and release the defendant; and while so lawfully in custody before a proper tribunal, he and his sureties executed and filed this bond. It was accepted by the court, or otherwise he could not have been discharged, and after such acceptance and discharge they will not be heard to say that it was not properly acknowledged and approved. This statute was enacted for the very purpose of obviating such objections when made in this class of cases.

But, on the other ground, I am of opinion this defense must fail. It assumes that the clerk acted as a committing magistrate in taking this bond. There is nothing in the record to show this to have been the case. There is no recital in the bond or elsewhere that the defendant was brought before the clerk for examination and bail by him as a magistrate authorized to hold to bail. He simply wrote at the foot of the bond "signed, sealed, and acknowledged and approved by me," signing his name as clerk of this court, and the bond is indorsed filed by him in the same manner as all other papers are indorsed when filed by whomsoever presented. The bond itself does not show that it was ordered or taken by any officer whatever, but is in the common form, and ample under the statute. T. & S. Code, 5153.

I think the presumption of law is that he acted as clerk, there being nothing to show that he assumed to act as a committing magistrate. The record shows the court was open that day; that defendant was present on trial in court; that there was a mistrial, and the case continued. From all

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this, and the presence of the bond in the record, it appears by the record that the bond was taken by the clerk under the immediate direction of the court itself. The proof *dehors* the record shows that he did so act in fact. Now it is true the act of February 26, 1853, (U. S. Stat. 163,) in terms, gave the clerks power to administer oaths, take acknowledgments, etc., and that this provision has not been carried into the Revised Statutes. I doubt if that act would authorize a clerk to act as committing magistrate and hold to bail. Recognizances cannot be taken by an officer out of court without a commission or statutory authority. Viner's Abridg., title, "Recog., A. 13." But they could always be taken in courts by virtue of the inherent power to do so. Id. and Bac. Abridg., title, "Bail." And one of the clerks of the enrollment, or a deputy, is to attend the acknowledging, vacating, etc., of all deeds and recognizances. Vin. Ab., title, "Recog., A. 15." A clerk has no statutory power to administer oaths, yet he or his deputy may do it. All such acts are done by him in his ministerial capacity, presumably in the presence of the court, and by its express order. *United States v. Nichols*, 4 McLean, 23; *United States v. Babcock*, Id. 115.

I have no difficulty in holding, therefore, that without any statutory authority, the clerk may take the acknowledgment and justify the obligors to a bail bond, when required by the court to do so.

Judgment for the plaintiff.

Commerford v. Thompson.

THOMAS J. COMMERFORD v. VIRGINIA C.
THOMPSON.

CIRCUIT COURT—DISTRICT OF KENTUCKY—MARCH 30, 1880.

IN EQUITY.

1. Section 8894 of the Revised Statutes providing that no letter or circular concerning lotteries, so-called gift concerts, etc., shall be carried in the mails, does not authorize a postmaster to refuse to deliver letters addressed to the secretary of a lottery company: (1.) Because the section does not apply to letters addressed to lottery companies or their agents by persons not connected with them. (2.) Because the section confers no power upon postmasters to seize or detain letters upon a mere suspicion that they contain unmailable matter.

2. But where it appears that letters addressed to the secretary of a lottery company actually belong to the company and relate to its business, an injunction enjoining the postmaster, etc., will be refused upon the ground that a court of equity could not be required to aid in the promotion of schemes which are contrary to public policy.

This was a bill brought by the complainant, a citizen of New York, against the defendant, postmaster of the city of Louisville, for the purpose of enjoining her from interfering with and delaying complainant's letters, addressed to him at Louisville. The bill charged upon information and belief, that there were in the post office and have been since the 10th of October letters of the value of \$5,500, addressed to "T. J. Commerford, Secretary, Louisville, Ky., Lock Box No. 121," with the required postage prepaid upon each letter, and that defendant had taken possession of the same, and refused to deliver them as the laws of the United States required, notwithstanding he had demanded possession thereof. The bill further alleged that at the time these letters were mailed, the postal laws of the United States and

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the regulations of the department authorized the mailing and transmission thereof and their delivery by the defendant; that complainant was entitled to the possession of the same, and unless they were delivered he would suffer great wrong and irreparable injury. Prayer for an injunction, and a direction to the defendant to deliver possession of any and all letters addressed to the complainant, as well as all such as may hereafter be addressed to him and received at her office.

In her answer, defendant puts her refusal upon certain instructions of the Postmaster General, directing the detention of letters addressed to the complainant. She denied that the laws of the United States or the regulations of the department required the delivery of such letters, and charged, upon information and belief, that all of said letters were letters and communications about and concerning a lottery known as "The Commonwealth Distribution Company;" that all of said letters were intended to be received by said company, although addressed in the name of the complainant, as "secretary," for convenience, and to conceal the fact that they were intended for said company, and that they were letters and communications concerning a lottery; that they were the exclusive property of said company and that complainant was but the secretary, so-called, and employé of said company and had no ownership or property in said letters; and that said letters, and every one of them, were deposited in the mail of the United States in violation of the laws of said government, and that their transmission from the various offices where they were deposited was also in violation of law. The answer further set forth the correspondence with the postmaster general, in which he directed defendant to detain letters addressed to "T. J. Commerford, Secretary," and insisted such order was justified by law, and was within the scope of his powers as Postmaster General.

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Beattie, W. O. Dodd and D. W. Sanders, for the complainant.

G. C. Wharton, United States Attorney, *A. A. Freeman*, Assistant Attorney General, and *J. K. Goodloe*, for defendant.

BROWN, J.—Few intelligent persons will deny that lottery gambling is a vice which merits the reprobation visited upon it by almost all the enlightened legislatures of modern times. The moral sense of the community long since pronounced against it, and the eloquent denunciations of Mr. Justice CATRON in the case of *The State v. Smith*, 2 Yerg., will touch a responsive chord in the breast of every honest man. The recent report of the Postmaster General to the House of Representatives sets forth with startling emphasis the systematic deceptions and often deliberate swindling practiced by the promoters of these and kindred enterprises, and his efforts to purge his department of all complicity in their doings, challenges the approval of public opinion.

At the same time courts are bound to administer the law as they find it, and are often powerless to remedy evils, the existence of which is fully admitted. The toleration or inhibition of lotteries is a matter exclusively within the control of the several States, and Congress can do no more than to deny them the use of the national mails for the propagation of their schemes. But while there is undoubtedly power to prescribe what shall or what shall not be carried by post, (*Ex parte Jackson*, 96 U. S. 727, 732,) the mails are, *prima facie*, intended for the service of every person desiring to use them, and a monopoly of this species of commerce is secured to the post office department. Sec. 3982. It is then scarcely necessary to say that the officers of the department are the agents of the public in the performance of this service, and that no postmaster, whether acting under the in-

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structions of the Postmaster General or not, can lawfully refuse to deliver letters addressed to his office, unless specific authority for so doing, is found in some act of Congress. Indeed the unlawful detention of letters by a postmaster is denounced by sections 3890 and 3891, and a violation of his duty to deliver mail matter is made punishable by fine and imprisonment.

Authority for the detention of the complainant's letters by the defendant in this case, is claimed to exist under the following section of the Revised Statutes:

"Section 3894. No letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section, shall be punishable by a fine of not more than \$500 nor less than \$100 with costs of prosecution."

Counsel for the Government have based their whole defense upon the applicability of this section to the case under consideration. Whether it was intended to apply only to mail matter posted in the interest of lottery companies, gift concerts and other similar enterprises, by their managers or agents, for the purpose of attracting custom, or equally to letters addressed to such companies, is the main question in this case. Its solution depends largely upon the construction to be put upon the word "concerning." It is obvious that this word was not intended to be used in its broadest sense, of "pertaining to or relative to," as such construction would include every letter of which the enterprises mentioned in the section were wholly or in part the subject; comprising not only letters written in the interest of these enterprises, but letters of inquiry, letters seeking legal advice, letters

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written for the purpose of suppressing their business, and even the correspondence carried on between the defendant and the general post office in this case. This certainly was not the intention of Congress.

The word "circular" we think affords a clew to the meaning of the section. This word obviously refers to circulars sent out by lottery companies for the purpose of advertising their schemes, and the word "letter" used in connection with it, under the rule of *ejusdem generis*, imports letters of similar character, and mailed for a like purpose. It was evidently the intention of Congress to strike at the root of the lottery system, by inhibiting to them the use of the mails for the publication of their schemes, and to fix a penalty for such use; but the imposition of such penalty upon the writers of letters addressed to the promoters of the enterprises, mentioned in this section, might result in great injustice, as many of these men purport to be engaged in a perfectly legitimate business, and the letters might be written by persons wholly ignorant of the true nature of the enterprise and with a perfectly innocent intent. The act is not only in derogation of the common law but is penal in its character, and should therefore receive a strict construction.

This section was evidently intended for the punishment of the guilty promoters of these impostures, but in other sections Congress has provided, not for the punishment, but for the protection of their victims, by requiring registered letters and money orders to be returned to the writers under such regulations as the Postmaster General may prescribe. Sections 3929 and 4041. No penalty is in express terms affixed to the senders of these letters, and we think it would be a forced construction of the law to apply the penalties of section 3894 to them. Obviously sections 3929 and 4041, will not justify the act of the defendant in this case, as the Commonwealth Distribution Company is not fraudulent, but

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is apparently legalized by the law of the State; (at least this was assumed upon the argument,) and there is no averment in the answer that the letters are registered, or contain money orders, nor is there an allegation of a compliance by the defendant with the requirements of these sections; indeed it was admitted upon the argument that the act of the defendant could not be justified unless 3894 covered the case.

But we think the act of the defendant in detaining these letters was unauthorized for another reason. The act declares certain letters unmailable, but provides no machinery for their arrest and detention, probably because no such machinery is possible, except by resort to the courts, without a violation of the constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures. *Ex parte Jackson*, 97 U. S. 733. The act simply provides for the imposition of a fine upon the person mailing them. We think this method of enforcing the statute is exclusive, at least of any such remedy as the detention of letters upon a mere suspicion, though I would not say that a postmaster might not lawfully refuse to receive letters *known* to him (by the statements of those mailing them or otherwise,) to contain unmailable matter. It is a cardinal rule in the construction of statutes, that where a new offense is created and a penalty is prescribed for it, or a new right is given and specific relief provided for the violation of such right, the punishment or remedy is confined to that given by the statute. *Sedgwick on Statutory Law*, 94. In this construction I concur in the opinion of Mr. Attorney General DEVENS, of April 30, 1878.

But, conceding that the act of the defendant in detaining these letters was unauthorized, and that the complainant might maintain an action at law for damages, it does not necessarily follow that he is entitled to an injunction. The writ of injunction does not issue as a matter of course, even

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if the complainant has made out a technical right to relief. "An application to a court of chancery for the exercise of its prohibitory powers of restrictive energies, must come recommended by the dictates of conscience, and be sanctioned by the clearest principles of justice." The granting of an application is largely a matter of discretion, and is addressed to the conscience of the chancellor acting in view of all the circumstances connected with the case. A party seeking this extraordinary remedy must come into court with clean hands, and show not only that his claim is valid by the strict letter of the law, but that in justice and equity he is entitled to this particular mode of relief. In the case of the *Maryland Savings Institution v. Schræder*, 8 Gill. & Johns. 93, the depositor of a sum weekly, in a savings institution, which he was entitled to withdraw at pleasure, agreed with and requested the institution to convert and invest his deposits permanently into the stock of said company. Upon the conversion he received increased dividends and participated in its entire profits. The institution became insolvent, and receiving in the course of its settlement with its debtors its own certificates of deposit in payment, which would absorb all available funds, the depositor, on the ground that a conversion of his money into stock was in violation of the charter of the company, applied for an injunction. It was held that, whether the charter authorized it or not, he was not entitled to the restraining power of the court. In delivering the opinion, the court observed: "The object of the injunction appears to have been, and its effect and operation are, to prevent the officers of the corporation from paying the special depositors or receiving their certificates of deposit in the payment of debts due to the institution. How far it is warranted by the principles of equity and conscience in such its operation upon their rights and interest, it is the duty of this court now to examine and declare; and we think that in a

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court of conscience at least, but little doubt can be entertained upon the subject. It is an unyielding and inflexible principle of the court of chancery, that he who seeks equity ought to be prepared to do equity. Before, therefore, the complainant can enlist the countenance of a court of equity in his favor, he must be prepared to render to these depositors that full measure of justice which the principles of equity and conscience demand at his hand." It was said in *Bosley v. McKim*, 7 Harris and Johnson, 468, that there was no case in which a court of equity ever granted a perpetual injunction to a complainant to protect him in the enjoyment of a naked legal right which he or those under whom he claims have stipulated by deed not to exercise." "Legal rights are to be asserted by legal means, and in such cases courts of equity never lend their aid where justice and equity do not imperiously demand it." In *Kneedler v. Lane*, 3 Grant's Cases, 523, an injunction had been issued against the officers of enrolling boards to restrain them from proceeding further with the drafting of soldiers, under the Conscription Act of March 3, 1863, upon the ground that the act was unconstitutional. In a subsequent argument of the case, this decision was overruled and the act pronounced constitutional. But it was further held that even if the act had been unconstitutional, the court ought not to have granted an injunction. In delivering the opinion Mr. Justice STRONG observed: "I had no doubt then, and I have none now, that these bills do not present a proper case for the interference of a court of equity by an injunction, even if the act of Congress were unconstitutional. The facts charged exhibit no case for the intervention of a court of equity. No chancellor ever enjoined in such a case, and I think it has never before been supposed that he has any jurisdiction over such wrong, if it be a wrong. As these complainants ask to be restrained * * * no one has ventured to assert that

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every civil wrong may be restrained by injunction, and that a judge sitting in equity can enjoin against any act that a common law court and jury can redress." See, also, Kerr on Injunctions, p. 6; 2 Story Eq., sec. 959; *Tucker v. Carpenter*, Hamps. 440; *Cassady v. Cavenor*, 37 La. 300; *Jones v. The City of Newark*, 3 Stock. 452; *Cobb v. Smith*, 16 Wis. 661; *Bonaparte v. The Camden & Amboy Railroad Co.*, Bald. 218.

In *Edwards v. The Allouez Mining Co.*, 38 Mich. 46, an injunction was denied to restrain a corporation from encroaching upon the land of a riparian proprietor and polluting the stream in front, upon the ground that he had bought the lands upon speculation knowing of the encroachments, and had tried to sell it to the corporation at an exorbitant price. The comments of Mr. Justice COOLEY are pertinent in this connection: "Wherever one keeps within the limits of the lawful action, he is certainly entitled to the protection of the law, whether his motives are commendable or not; but if he demands more than the strict rules of law can give him, his motives may become important. In general, it must be assumed that the rules of common law will give adequate redress for any injury, and when the litigant avers that under the circumstances of his particular case they do not, and that, therefore, the gracious ear of equity should incline to hear his complaint, it may not be amiss to inquire how he came to be placed in such circumstances."

Let us apply these principles to the case under consideration. The answer avers, and for the purposes of this case it must be taken as true, that all of said letters are letters and communications about and concerning a lottery known as the Commonwealth Distribution Company, and that all of said letters are intended to be received by said company, and are its exclusive property. The word "concerning," as used in this answer must be taken in the sense in which it was in-

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tended by the pleader, and as meaning that the letters detained belonged to the Distribution Company, and related to the business carried on by that company. It is fair to presume that this company is seeking them in furtherance of its business as a lottery; indeed, in the bill they are expressly averred to be of the value of over \$5,000, and in their brief complainants' counsel admit that these are in fact orders for tickets. Now, Congress has placed upon all this class of enterprises the stamp of its disapproval. It has denounced it by legislation as far reaching as its constitutional power permitted, as contrary to public policy. We think that a court of equity ought not to lend its aid, directly or indirectly, to schemes which Congress has thus characterized. Suppose the defendant had detained letters and circulars mailed by this company, and the complainant had filed a bill, confessing the character of the letters, to enjoin her action upon the ground that the section only imposed a penalty, and did not in terms authorize the detention of letters; we think a court of equity would not hesitate to refuse its aid thus sought for an unlawful purpose. The case under consideration is but one remove from this. In all human probability the letters detained here were written not only in furtherance of the lottery business, (*Dwight v. Brewster*, 1 Pick. 50,) but are to be answered, and in answering them complainant will be guilty of a clear violation of the law. Had he replied to the answer, and made it appear that the letters had no connection with the lottery business, he might have been entitled to the protection of a court of equity. But the pleadings fail to show a moral obligation on the part of this court to relieve him. In any light in which this case can be viewed, it is impossible to avoid the conclusion that the court is required to lend its aid to a scheme, condemned alike by Congress and by public opinion. Complainant should be left to his remedy at law.

An order will therefore be entered dismissing the bill.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY v. JAS. L. GAINES, COMPTROLLER.

CIRCUIT COURT—MIDDLE DISTRICT OF TENNESSEE—APRIL, 1880.

1. **STATUTORY CONSTRUCTION—EXEMPTION FROM TAXATION.**—The charters of the earlier railroad companies incorporated by the State of Tennessee contained exemptions from taxation; but in later charters the Legislature, to save repetition, instead of enumerating all the powers and immunities intended to be granted, was content to refer to some earlier charter, and give to the new company—"all the rights, powers and privileges" of the old. It is clear that the Legislature intended to confer these "rights, powers and privileges" as fully as if specifically repeated in the new charter, and such was the recognized construction of such charters by all the departments of the State government for more than twenty years.

2. **SAME—"PRIVILEGE."**—Where one railroad company is incorporated with the "rights, powers and privileges" of a pre-existing company, the new company acquires an exemption from taxation guaranteed to the former. The word "privilege" includes in its ordinary definition an exemption or immunity from taxation. Cases cited: *State v. Betts*, 4 Zabris-
kie, 556; *Humphrey v. Pegues*, 16 Wall. 244; *Morgan v. Louisiana*, 98 U. S. 217, 223; *Railroad Companies v. Gaines*, 97 U. S. 711, 712.

3. **CONSTITUTIONAL LAW—EXEMPTION FROM TAXATION.**—The Legislature of a State may contract in a corporate charter for exemption of the corporate property from taxation, unless there be some constitutional prohibition. No such prohibition is contained in the Tennessee constitution of 1834. Cases cited: *Temlinson v. Branch*, 15 Wall. 460; *K. & O. R. R. Co. v. Hicks*, 1 Legal Reporter, 343.

4. **STATUTORY CONSTRUCTION—WHEN FEDERAL COURTS WILL FOLLOW STATE COURTS.**—Ordinarily the Federal Courts follow the ruling of the State Courts in their interpretation of the constitutions and statutes of their respective States; but where property has been acquired and investments made under statutory contracts generally recognized and believed to be constitutional, in the absence of adjudications declaring them invalid, the Federal Courts are not concluded by the construction which the State Courts may give to such statutes subsequent to the acquisition

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of such property rights. Cases cited: *Olcott v. Supervisors*, 16 Wall. 678; *Pine Grove v. Talcott*,¹ 19 Wall. 666.

5. **STATUTORY CONSTRUCTION—EXEMPTION FROM TAXATION.**—An exemption from taxation cannot be implied from the apparent spirit or general purpose of a statute. It must be certain and explicit; every well-founded doubt must be resolved in favor of the State. But this rule does not call for a strained construction adverse to the real intention of the Legislature; and to ascertain that intention the court will look to the context as well as the particular words used, taking into consideration the contemporaneous surroundings, and the purposes which the Legislature had in view.

6. **STATUTORY CONSTRUCTION—USE OF SAME WORD IN DIFFERENT CONSTITUTIONS OR STATUTES.**—The fact that the constitution of a State uses a word (*e. g.*, the word "privilege") in one sense in one clause, is no evidence that it is used in the same sense in every other clause; and were it used in but one sense throughout the constitution, it would not follow that the Legislature used it in the same sense in statutes subsequently passed. Even in the same statute a word is often used with distinctly different meanings, the courts giving to it in each instance the meaning which the Legislature intended it to have in that particular connection.

7. **CONSTITUTIONAL LAW—INJUNCTION—TAXES**—Where a State has by valid contract exempted certain property from taxation, it cannot by subsequent legislation subject that property to taxation nor prohibit the United States Courts from using their injunctive powers to protect the contract from violation.

8. **INJUNCTION—TAXES.**—While the general rule is that courts will not enjoin the collection of taxes upon the mere ground that they are excessive or illegal; yet if their exaction is unconstitutional, and the party assessed has no other adequate remedy, or their enforcement will occasion irremediable oppression and produce a multiplicity of expensive suits, an injunction to restrain their collection will be granted.

Ed. Baxter, solicitor for complainant.

B. J. Lea, Attorney General, for defendant.

By the 39th section of the act of December 11, 1845, incorporating the Nashville & Chattanooga Railroad Company, it is provided "That the capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses

¹ 1 Flippin, 120.

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and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road and no longer."

The Tennessee & Alabama Railroad Company was chartered in 1851-52, with all the "rights, powers and privileges," and to be subject to all the "liabilities and restrictions" conferred and imposed by its charter upon the Nashville & Chattanooga Railroad Company and amendments thereto.

The Central Southern Railroad Company was incorporated in 1853-54, with all the "powers and privileges" and to be subject to all the "restrictions and liabilities" prescribed in the charter of the Nashville & Chattanooga Railroad Company and amendments thereto, with some exceptions not material to the determination of this case.

These two last-named companies, the Tennessee & Alabama and Central Southern, have been consolidated into the Nashville & Decatur Railroad Company.

The Nashville & Memphis, subsequently designated the Memphis & Ohio Railroad Company, was chartered in 1851-52, with all the "powers, rights and privileges," and to be subject to the restrictions, so far as such provisions may be applicable, contained in the acts incorporating the Nashville & Chattanooga and Memphis & Charleston Railroad Companies, together with the acts amendatory of them as fully as if herein set forth at length, and the same are hereby declared to form and constitute a part of the charter hereby granted to the Nashville & Memphis Railroad Company."

The Memphis, Clarksville & Louisville Railroad Company was incorporated in 1851-52, and vested with all the "rights, powers and privileges," and subject "to all the restrictions and liabilities of the Nashville & Chattanooga Railroad Company," except as therein otherwise provided, which exceptions have no bearing on this case.

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The complainant is lessee of the Nashville & Decatur Railroad Company; it has consolidated with the Memphis & Ohio Railroad Company and is the owner of the Memphis, Clarksville & Louisville railroad by purchase under the act Dec. 22, 1870, providing for the sale of delinquent railroads. By virtue of this purchase, complainant succeeded to all the *rights, privileges and immunities* appertaining to the franchises of the road so sold to it under its act of incorporation and amendments thereto.

From the foregoing it will be seen that the Tennessee & Alabama Railroad Company was vested with all the "rights, powers and privileges;" the Central Southern Railroad Company, with all the "powers and privileges;" the Memphis & Ohio Railroad Company, with all the "powers, rights and privileges," and the Memphis, Clarksville & Louisville Railroad Company, with all the "rights, powers and privileges" of the Nashville & Chattanooga Railroad Company.

The period named in said several charters, during which time the property of said companies was respectively exempt from taxation, had not elapsed when the assessment complained of was made.

The act of the 24th of March, 1875, entitled "An Act Declaring the Mode and Manner of Valuing the Property of Railroads for Taxation," enacts, section 1, "that each railroad company owning and operating a railroad in the State, shall, on or before the 1st day of May of each year, make out and file with the Comptroller of the State Treasury a complete schedule of all its property, real, personal and mixed, setting forth therein the length in miles or fractions thereof of its entire road-bed, switches and side tracks, and showing how many miles or fractions thereof lie in the State, in each county of the State, through which the road passes, and in each incorporated town, and the value of the whole and each part thereof, as subdivided herein; the total amount

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of capital stock; the number of engines and their respective values; the gross annual receipts; the number of cars of every character, their classes and value; the number of depot buildings and warehouses, and other buildings; in what county and incorporated town located, and the value of each, including the lands and lots on which the same are built; the value of all machine shops and stationary machinery and tools therein, and in what county and incorporated town located, including the land on which the same are built; all real, personal or mixed property belonging to the company within the State, not enumerated above, with its value."

Said act further provides for the appointment by the governor of three commissioners, to be styled "Railroad Assessors for the State at large." To these commissioners the comptroller is required to deliver the "schedules aforesaid." When this is done, the commissioners are "to proceed to ascertain, test and value the property belonging to said company," upon the basis prescribed in said act, and value said property and certify their estimates to the comptroller, and when such valuation is approved by the governor, secretary of state and treasurer, the comptroller is directed to "ascertain the amount of taxes due the State and notify the company thereof, and if not paid he may issue his distress warrant to any sheriff in the State to be levied upon any personal or real property or franchises of the company, with power to sell the same and make a deed to the purchaser," and "the governor is authorized to issue his warrant to any sheriff along the line of said railroad, to put such purchaser into the possession of such road and all its property."

Said act further directs the comptroller to certify to the County Court clerk of each county through which a railroad runs, the amount to be taxed by said county for county purposes, and likewise to the mayors of incorporated towns through which the road passes, the amount to be taxed by

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such towns; and the clerk is required to enter the same upon the collector's books, specifying the amount of taxes to be collected, etc.

The Legislature by the 11th section of said act provided further: "That every railroad company which will accept as a special amendment to its charter for a period of ten years from the first day of January, 1875, and that will pay annually to the State one and one-half per cent. on its gross receipts from all sources shall be exempt from the provisions of the foregoing sections, (those recited above,) and the payment of said one and one-half per cent. upon all gross earnings of said road, shall be in full (for the period mentioned, ten years,) of all taxation."

Complainant accepted the compromise thus offered and made and delivered the schedule required by the act to the comptroller, and paid into the treasury one and one-half per cent. of its gross earnings for the year 1875, amounting to \$52,712.92.

But in December, 1876, the Supreme Court of the State, in the case of *L. & N. R. R. Co. v. Ellis*, held that the Legislature had not the power, under the Constitution of 1870, then in force, to enact said 11th section, and that the same was in conflict with that instrument, and therefore inoperative and of no legal force.

Complainant then fell back on its chartered rights, claimed its twenty years' exemption, and made application to the Legislature to refund the amount so paid by it under said section, which the Legislature refused to do; but in lieu, that body passed the act of the 20th of March, 1877, entitled "An Act to Amend an Act Entitled 'An Act Declaring the Mode and Manner of Valuing the Property of a Railroad Company for Taxation,' passed March 20, 1875, and to adjust the rights of the State and railroads in Tennessee

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under the decision of the Supreme Court, holding that the 11th section of said act is unconstitutional."

This act revived, substantially, the machinery created by the first, and directed an assessment by the commissioners, etc., of the complainant's property aforesaid as a basis for its taxation for the years 1875, 1876, 1877 and 1878, and then by the 9th section thereof provided:

"That all railroads of the State which had accepted and complied with the provisions of the 11th section of the act of March 20, 1875, shall be entitled to a credit for the amounts respectively paid by them to the State" under the assessments made by authority of said act for the years 1875, 1876 and 1877 "and if the amounts so paid by said companies shall exceed the assessments for said years, the excess shall be refunded by the State to said railroads with interest."

Commissioners were accordingly appointed to act under and pursuant to the provisions of the act last mentioned, who proceeded and assessed complainant's property aforesaid for taxation at the gross sum of \$3,370,700—and certified their action to the comptroller.

At this juncture complainant filed its bill in and by which it prays for an injunction restraining the comptroller "from certifying to the County Court clerk of each county, and likewise to the mayor of each incorporated town, the amount assessed as aforesaid to be taxed by said counties or towns respectively against complainant "for the years mentioned;" and "if before this application for an injunction can be made, said defendant (the comptroller) shall have made said certificate, then, that by mandatory injunction, he be ordered to withdraw the same," and for other and appropriate relief.

A restraining order was granted until this application could be heard, and we are now, after full argument, called on to decide whether complainant is entitled to the injunction prayed for.

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· **OPINION PROPER.**—The doctrine that the Legislature of a State, unrestricted by constitutional prohibition, has power to contract in a charter authorizing the formation of a corporation, for an exemption of its property from taxation, has not been denied in the argument of this case. The right to do this has been repeatedly affirmed by the Supreme Court of the United States. *Tomlinson v. Branch*, 15 Wallace, 460. And the Supreme Court of the State has held, in the *Knoxville & Ohio R. R. v. Hicks*, 1 Legal Reporter, 343, that no such prohibition is contained in the constitution of 1834—the constitution in force when the several charters under which the complainant claims exemption were passed. It is further admitted that the 29th section of the act incorporating the Nashville & Chattanooga Railroad Company is a good and valid exemption to *that* company for the period therein specified; and that the complainant has, by its lease, consolidation and purchase, succeeded to all the rights, privileges and immunities of the several corporations which it represents in this litigation. On these several propositions the parties are agreed. It is on the next and succeeding issue that the controversy arises. The complainant contends that the grant contained in the several charters to which complainant is entitled, of all the “rights and privileges,” or “rights, powers and privileges,” of the Nashville & Chattanooga Railroad Company, invested said corporations with an exemption of their several properties from taxation for twenty years from and after the completion of their respective roads; and that said exemption is a contract, and, as such, under the protection of the National Constitution. This is *the* question in the case. The complainant affirms and the defendant denies the proposition. The controversy, therefore, narrows down to one of construction: What did the Legislature intend when it conferred the “rights and privileges” of the Nashville & Chattanooga Railroad Com-

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pany on the several corporations to whose rights the complainant has succeeded"—did it intend to include exemption from taxation?

The question has been twice before the Supreme Court of Tennessee and in both instances it was decided in the negative. *East Tennessee, Virginia & Georgia Railroad Company v. Hamblen County*, decided at Knoxville in 1877, but not reported, and *Wilson v. Gaines*, 2 Legal Reporter, 31. But in both cases the learned judge delivering the opinion of the court, admitted that the terms "rights and privileges," as defined by lexicographers and understood by the jurists of other States, were comprehensive enough to carry the exemption. But the court seems to have regarded itself as precluded from giving the usual and ordinary effect to these terms, upon the assumption that the meaning of the word "privilege" had been restricted by a provision in the constitution of the State. In the case of *Wilson v. Gaines*, the court use this language: "However comprehensive a meaning may have been given to the term *privilege* by the courts of other States, or by lexicographers, we are constrained to use it in the restricted sense and meaning given to it in our own laws, and especially by the constitution of the State. That it was not intended or understood to be sufficient by the framers of our constitution of 1834 to embrace exemptions, is made clear and indisputable by reference to section 7 of Article XI of that instrument, by which it is ordained, 'the Legislature shall have no power to pass any law granting to any individual or individuals, rights, privileges, immunities or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law, provided, always, the Legislature shall have power to grant such powers of incorporation as they may deem expedient for the public good.'"

Now these decisions are direct and emphatic against the complainant's claim of exemption; and it is insisted that they are conclusive upon this court. If so, we are relieved from all obligation "to exercise our own judgment." But, is this court concluded by these decisions? Ordinarily the Federal Courts adopt and follow the ruling of the State Courts, in their interpretation of the constitution and statutes of their respective States. This is the rule. But to this rule there are exceptions, as well established as the rule itself. The Federal Courts "will follow, as of obligation, the decisions of the State Courts on local questions peculiar to themselves, or on questions respecting the construction of their own constitutions and laws." But if a "contract, when made, was valid under the constitution and laws of the State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action of the Legislature or judiciary will be regarded by the Federal Courts, "as establishing its invalidity." *Olcott v. Supervisors*, 16 Wallace, 678.

This principle was somewhat extended in the case of the *Township of Pine Grove v. Talcott*,¹ 19 Wallace, 666. In this case it appears that in March, 1869, the State of Michigan, by an act of its General Assembly authorized any township, city or village in the State to pledge its aid, by loan or donation, to any railroad company in the construction of its road. The defendant township voted aid to the road mentioned in the case and issued its bonds therefor. At the time the constitutional power to do this was not controverted but generally conceded. Numerous acts recognizing this power had been passed by the Legislature. But after the bonds in question had been issued and negotiated on the faith of this popular and legislative construction of the constitution of the State, the Supreme Court of Michigan held, in two cases, that all the acts authorizing such aid by counties, cities and town-

¹ 1 Flippin, 120.

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ships, were unconstitutional. *The People v. Salem*, 20 Mich. 452; and *Bay City v. The State Treasurer*, 23 Mich. 499. Encouraged by these opinions Pine Grove township refused to pay the bonds sued on, and it was insisted in argument that the Federal Courts were concluded by the construction which the Supreme Court of the State had thus placed on the State constitution. But the Supreme Court of the United States held otherwise. The court say: "We have examined these cases with care" and find "that they are not satisfactory to our minds." The judgment overruling the decisions of the Supreme Court of Michigan is predicated mainly on the ground that the question "belonged to the domain of general jurisprudence touching commercial paper." But the reasoning of the court goes beyond this. "When," say the court, "the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid." The Legislature had passed many acts of this character. And during the period covered by their enactment, "neither of the other departments of the State government lifted its voice against them." From this we infer that in all cases where property has been acquired and investments made under and in virtue of statutory contracts, generally recognized and believed to be constitutional and valid, in the absence of adjudications declaring them invalid, the Federal Courts, in the exercise of their jurisdiction and in discharge of the duties especially and peculiarly imposed on them of preserving and enforcing the National Constitution and protecting contracts against impairment, are not concluded by the construction which the State Courts may, subsequent to the acquisition of such property, give to such statutes; but that the Federal tribunals will, in all such cases, where the construction given by the State Courts "is not satisfactory to their minds," construe such statutes for themselves. Such we understand is the meaning of the

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Pine Grove case. Now we think this case comes within the principle announced, and we shall therefore so construe the several statutes involved.

It is a legal axiom, long recognized, that an exemption from the common burden of taxation, cannot be implied from the apparent spirit or general purpose of a statute. It must be certain and explicit; and if there is any well founded doubt, arising out of the ambiguity or obscurity of the language of the statute, as to whether the Legislature intended an exemption or not, the doubt will be resolved in favor of the State. But this axiom does not call for a strained construction adverse to the legislative intention. On the contrary it is the duty of the court to ascertain as best it can in accordance with the established canons of construction, the real intention of the act to be construed, and when a conclusion is reached, to enforce the legislative will as it may be statutorily declared. Where the language is clear and explicit the court is bound, without considering consequences, to give it effect. It must be construed as a whole; the office of a good expositor, says my Lord COKE, "is to make construction on all its parts together." The plainest words may be controlled by the context. It is the intention expressed in the act as a whole that is to prevail; courts look to the context as well as to the words for the meaning of particular words used in the act. They may also take into consideration the purposes the Legislature was endeavoring to accomplish, acts in *pari materia* and contemporaneous surroundings. These rules of common sense, applied from time to time in the construction of statutes, shall guide us in this instance.

The constitution commands, and, as far as was practicable, guaranteed impartiality of legislation, and this policy seems to have been adopted by the Legislature and applied to all railroad companies as far as the circumstances of the several

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cases would permit. The exemption from taxation of the capital stock absolutely, and of the roads, fixtures, appurtenances and vehicles of transportation for twenty years seems to have been the general rule. Clauses providing for these exemptions were incorporated in the earlier charters. But in later acts, the Legislature, instead of inserting in each act of incorporation all the powers and immunities intended to be granted, was content to refer to some previous charter and give to the new company "all the rights, powers and privileges" of the old. It is, we think, clear that the Legislature, as it declared in some of these acts, intended to confer these rights, powers and privileges, "as fully as if herein set forth at length," and such was the then prevailing belief. No one questioned this interpretation of these acts. No attempt was made to levy and collect a tax from these properties, from the date of said respective charters until the act of 1875. That the Legislature intended by the grant to these several companies of the "rights and privileges" and "rights, powers and privileges," of the Nashville & Chattanooga Railway Company, to confer on them the same immunity from taxation that had been granted to the latter, we have no doubt. Are these terms, fairly construed, broad enough to include exemption? It is admitted that they are, if they are to have the usual force and effect accorded to them by lexicographers and jurists of other States; but, as hereinbefore stated, it is assumed that the meaning of the term "privilege" has been restricted by the State constitution, and that when employed in a statute, the courts must presume that the Legislature intended to restrict its meaning within the limits prescribed by the constitution.

We dissent entirely from the assumption that the constitution intended in the provision of that instrument quoted or any part thereof, to qualify or restrict the force and effect of plain English words. It is true that the constitution

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forbids the passage of laws granting rights, privileges, immunities or exemptions to an individual or individuals, other than such as may be by the same law extended to every member of the community who can bring himself within its provisions. Now we may, for the sake of the argument, further admit, that the use of these terms, in the connection in which they stand in the clause quoted, indicates that a different meaning was attached to each, and yet it does not follow that the framers of the constitution intended to give a constitutional definition to these words, and thus, by a constitutional provision, make it the duty of the court, in all instances in which they find either of them employed in a statute, to construe it as meaning the same as it does in the clause of the constitution referred to. If it occurred nowhere else in that instrument, than in the clause mentioned, the inference drawn therefrom would, to say the least, be a violent one. Most words possess different shades of meaning. In one connection they may mean one thing, and in another and different connection another and quite a different thing. The same word is often used with distinctly different meanings in the same statute; and yet the courts give to it, in each connection in which it is employed, the meaning which the Legislature intended it to have in that particular connection. An illustration of this is found in the constitution itself in the use of this very word "privilege." It is found elsewhere in that instrument than in Article XI. It frequently occurs in the constitution, and is so used as to involve every shade of meaning of which it is, according to lexicographers, susceptible. Now if the framers of the constitution have thus employed it, with one meaning in one place, and with another and different meaning in other places, what becomes of the hypothesis that its meaning has been constitutionally defined by Article XI? It must fall to the ground. And this out of the way, we are at liberty

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to interpret the terms "rights and privileges," as defined by judicial and lexical authorities.

Webster says that *privilege* is a right or *immunity* not enjoyed by others; an *exemption* from an evil or burden. That under the Roman law it denoted some peculiar benefit, some right or advantage not enjoyed by others, etc.

Crabbe says it signifies a law made in favor of an individual. It consists of some positive advantage, *exemption* or *immunity*. In its more extended sense it comprehends every prerogative, *exemption* and *immunity*.

Abbott defines it to be a right or immunity by way of exemption from the general law.

Bouvier defines it as a private law in derogation of common right.

Pashcal says it is a special right belonging to an individual or class—properly an *exemption* from some duty, an immunity from some general burden or obligation.

Mr. Justice WASHINGTON says that an exemption from taxes is embraced by the general description of privileges.

And in *State v. Betts*, 4 Zabriskie, 556, the court say: "The term privilege includes in its ordinary definition an *exemption* from such burthens as others are subjected to, as the *privilege* of being exempt from arrest or from *taxation*."

From these authorities it is seen that a *privilege* is an *exemption* and an *exemption* is a *privilege*. Did the Legislature mean by this language, as found in these several charters, that it should be construed in accordance with these standard authorities? On this question we are, by the decision in *Humphrey v. Pegues*, 16 Wallace, 244, relieved of all doubt if we ever entertained any. Here, after full argument, the court held that where one railroad company was incorporated with the "rights, powers and privileges" of another and pre-existing company, that the new company acquired an exemption from taxation guaranteed to the

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former, and in support thereof say: "All the privileges, as well as the powers and rights of the prior company, were granted to the latter company. A more important or more comprehensive *privilege* than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, of a special exemption from a burden falling on others."

Humphrey v. Pegues, is exactly similar to the case under consideration and is conclusive, unless its authority has been overthrown or weakened by subsequent decisions of the same court. It is insisted that it has been overruled or materially qualified by *Morgan v. Louisiana*, 93 U. S. 223. We do not concur in this view. The questions involved in the two cases were very different. There is no conflict between them. In the first it is held that a grant to one railroad company of the "powers, rights and privileges" of another, carried to the former an exemption from taxation enjoyed by the latter, while in the second case it was decided that a foreclosure sale of the "property and franchises" of a railroad company did not vest the purchaser with an immunity from taxes possessed by the company whose property was sold. Because, say the court, the "franchises" of a railroad company are such as "are essential to the operations of the corporation; positive rights or privileges, without which, the road of the company could not be successfully worked," and that "immunity from taxation is not one of them."

Nor is the authority of *Humphrey v. Pegues*, in the least shaken by the decision in *Railroad Cases v. Gaines*, 97 U. S. 711-712. On the contrary, there is in this last case a clear recognition of the principle announced in the former, as the language of the Chief Justice, found on pages 711 and 712, will disclose. He says: "In *Humphrey v. Pegues*, we held that the grant to one company of all the powers, rights and privileges of another, carried with it an exemp-

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tion, but in *Morgan v. Louisiana*, that such an exemption did not pass by sale of the franchises of a railroad company. * * * This seems to us conclusive of the present case. The grant here was not of all the rights and privileges of the Nashville & Chattanooga Railroad Company, but *of such as were necessary for the purpose of making and using the road*, or in other words, the franchises of the company, which do not include immunity from taxation." Here it is clearly intimated that the court recognized the authority of *Humphrey v. Pegues*, and that but for the qualifying words, "of such as were necessary for the purpose of making and using the road," which distinguished the cases, the exemption claimed would have passed. These three cases are entirely consistent and may well stand together.

Without accumulating authorities, which could be easily done, it will suffice for us to say that, in our opinion, the Legislature, by the use of the terms "rights and privileges," as they are employed in the several statutes before us, for construction, intended to vest said several corporations with the privilege of exemption from taxation for the period of twenty years after the completion of their respective roads, to the same extent that such exemption had been granted to the Nashville & Chattanooga Company; that this conclusion is sustained by lexicographers and by the Supreme Court of the United States; that said charters are contracts, within the meaning of the Federal Constitution, the obligations of which cannot be constitutionally impaired by legislation or judicial construction, and that it is our duty, so far as we can legitimately, to protect the rights secured by the contracts.

But can we do this by injunction? The tax demanded is due, in part, to the State, and by the act of March 21, 1873, it is provided, "That in all cases in which an officer charged by law with the collection of revenue due the State, shall institute any proceeding, or take any steps for the collection

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of the same, alleged or claimed to be due by said officer, from any citizen, the party against whom the proceeding or step is taken, shall, if he conceives the same unjust or illegal, or against any statute or clause of the constitution of the State, pay the same under protest, and upon his making such payment, the officer or collector shall pay such revenue into the State treasury, giving notice at the time of payment to the comptroller that the same was paid under protest, and the party paying said revenue may, at any time within thirty days after making said payment, and not longer thereafter, sue the said officer having collected said sum, for the recovery thereof, and the same may be tried in any court having jurisdiction of the amount and parties; and if it is determined that the same was wrongfully collected as not being due * * * for any reason going to the merits of the same, the court trying the case *may* certify of record that the same was wrongfully paid and ought to be refunded, and thereupon the comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury." The act then declares "that there shall be no other remedy" for the wrongful demand and collection of the public revenues, and inhibits the issuance of injunctions, writs of super-sedeas, prohibitions and all other process designed to hinder or delay the collection thereof.

Now, without stopping to inquire or decide how far this act can lawfully restrain this court from interfering to enjoin the collection of taxes imposed by legislation on property not previously exempted from taxation, we have no hesitation in holding that it ought not to be construed in a case like this to paralyze the powers of this court as they existed prior to its enactment. To give to it such force would be to permit the State effectually to legislate to impair the obligation of a contract by the enactment of a law prohibiting an adequate remedy. This cannot be tolerated, and for the

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purposes of this case we will proceed as if the statute last referred to had not been passed.

It is, however, the general rule, independent of statutes like the foregoing, not to interfere by injunction, preliminary or final, to prevent the collection of taxes excessive in amount or irregularly or illegally exacted. But this rule, sound in itself, is not inexorable. If the exaction of the tax is unconstitutional and the citizen assessed has no other remedy, or if it appears that the enforcement of payment of the tax demanded will occasion irremediable oppression, the clouding of titles, or a multiplicity of suits, etc., an injunction may issue. 92 U. S. 614. Does this case come within any of these exceptions? The statute under which it is claimed, we have already declared to be in contravention of the Federal Constitution. The demand is for taxes from property which is by contract exempt from that burden. It is to be collected as well for the several counties and incorporated towns through which complainant's roads run, as for the State. The amount demanded is large, not less, including that claimed for the towns and counties, than \$40,000. Its payment will be to twelve or fifteen different collectors. When collected, it will go into the State, county and municipal treasuries. Once paid in, it could be reclaimed only by suits. The number of these suits (about forty) would have necessarily to correspond with the number of collectors, counties and towns, to whom the payments are to be made. They would be attended with delay and costs. And when a recovery should be had, it would be for the sum paid without interest and without compensation for labor and expenditures incident to the prosecution of the suits. Complainant would be exposed to all these and many other inconveniences not enumerated. Relief obtained with such sacrifices is entirely inadequate. There are several elements of equitable cognizance entering into the case to give this court jurisdiction,

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and justice demands the exercise of its restraining hand. The injunction will therefore be issued as prayed for. If in this we have committed an error, it can be easily corrected by appeal. We have given to the parties the benefit of our best convictions, and these it is our duty to follow, until the court of last resort, whose decrees are final, shall decide otherwise.

BAXTER, J., prepared the syllabus in this case. [*Reporter.*]

THE MARGARET.

DISTRICT COURT—WESTERN DISTRICT OF MICHIGAN—APRIL
8, 1880.

LIABILITY OF TUG, WHEN TOWING, AND DUTY OF TOW.

If the tow, at a critical point, when about to enter an harbor, carries such sail as to take her out of the control of the towing craft, either as to her headway or course, the tug should not be held at fault for any disaster that ensues. The tow should be steered properly, and follow in the wake of the tug, and perform all those duties which nautical skill demands in order to properly manage the tow. .

Ackley & Farr, for libellant.

G. C. Markhaus, for tug Margaret.

WITHEY, J.—In seeking to enter the harbor of Ludington, the schooner Mary was taken in tow by the tug Margaret, June 20, 1878, about 9 o'clock in the evening. She was about five miles south of the south pier, and three or four miles out from shore; wind from the northwest, from fifteen to twenty miles an hour. The course taken to reach the

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harbor was about north by east; speed about three or four miles an hour, the schooner carrying her mainsail, foresail, and fore-staysail. The two piers at Ludington run due west from the shore; the south pier extends into the lake about 200 feet further than the north pier, so that the vessel in entering the harbor had to round the south pier. The same course was continued after the tug took hold of her until the turn was made to go into the harbor. In entering, the schooner went off to the northward, and north of the north pier, when the line was cut by the tug. During the night the schooner was damaged from the position she occupied, and this suit was brought to indemnify her for such damages. The sea was running so that the current tended to carry the vessel leeward. The captain of the schooner states that when within half a mile of the south pier he ordered the mainsail lowered, and it was slackened about one-half down, or a little more; that the tug kept its course, passing the end of the south pier at about 100 feet distant, and until nearly opposite the end of the north pier, then turned sharp, the line slackened, and the schooner "shot past the dock, when a strain came on the tow line," and she struck the end of the north pier, and the tug cut the line. He testifies that he received no orders from and gave none to the tug; but says when he gave his line to the tug he asked the master if he should keep on sail to help her along, and received answer, "Yes, sir;" that just prior to entering she was steering about north, or north by east, and as she passed the end of the south pier "then she was turned." He says he cannot state what way the vessel was headed when she struck the end of the north pier, "because she was going off to the eastward fast when she struck." When asked the reason of the vessel going on the north pier and around it, he answers, "From the fact of the captain (of tug) not bringing the vessel far enough out into the lake to the westward and giving a

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chance to follow the tug into the harbor, and having cut the line."

The master of the tug testifies that he had the vessel in tow from an hour and a half to two hours; that she had on her foresail, mainsail and jibs; that he thinks they were west of the south pier before rounding to, to come in, from 1,200 to 1,400 feet, because he could not see the south pier when he got in range of the piers of light; that the vessel kept on her canvas after they had rounded to, to make the harbor; that she straightened up in line of the tug before the latter reached the end of the piers; that as she rounded to he could see both her tow line and her signal lights; that she followed the tug until he got abreast of the end of the north pier, when she sheered off to the northward of the north pier. He was asked what caused the vessel to sheer and go to the northward of the north pier, and answered, "having her mainsail on."

He further testifies that the vessel had her "mainsail on, and her sheets hauled clear up, coming close by the wind, before we made the turn. When we got pretty close to the end of the north pier a sea happened to strike his port quarter and that carried his stern to the southward; enough so that his mainsail would fill again, and so that the schooner luffed up and shot by the end of the north pier. The schooner had to slack her main peak halyards in order to make her course up alongside the north pier; when she got around to the northward she shot clear by the pier." He further states that the tug was there just inside the north pier, so that her stern was just about even with it, and she was about 25 feet south of the north pier.

There are the usual contradictions and disagreements between the men on the schooner and those on the tug touching the material facts. There are five witnesses, sailors and masters of vessels, having no interest, who agree sub-

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stantially that the cause of the disaster was attributable to unskillful management by the master of the schooner. Taking into consideration the direction and strength of the wind and the condition of the sea, it would not seem to be proper management on the part of the master of the schooner, after turning to go into the harbor in tow of a tug, to carry any mainsail at all. To carry any part of her mainsail would, in the opinion of experienced sailors, have a tendency to render her unmanageable; cause her to broach to and go to the windward in spite of the tug.

It is claimed that the tug was at fault in failing to keep the line, and not using proper efforts to bring the vessel back from the north side of the north pier, but masters and seamen of much experience have said that the tug could not have prevented the disaster after the schooner went to the northward of the pier. It was plainly the duty of the master of the vessel, in the absence of any directions from the master of the tug, to manage his helm and sails judiciously.

It is not contended that it was unsafe for the tug to undertake bringing the schooner in, from any condition of the wind or sea. It is claimed that the tug slackened her line at a critical moment for the vessel, and came too close to the end of the south pier when turning to come in. The better opinion seems to be, on the part of those competent to judge, that the vessel would be carried ahead so that the tow line would be slackened between the seas in consequence of the force of wind and sea. Whether the line was slackened from any other cause does not satisfactorily appear. As to the distance west from the end of the south pier when they turned to come in witnesses do not agree, and this fact does not seem to us at all controlling.

The evidence establishes, in our opinion, that there would have been no difficulty in bringing the tow in safely had the schooner carried no part of her mainsail, and the question

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of liability appears to us to turn upon whether the tug or the schooner is responsible for so much after sail being carried from the time when the turn was made to come in.

The tow was from 120 to 180 feet in the rear of the tug. It was in the night, and in our opinion, unless the tug had assumed to take entire control and direction of the vessel, it was the latter's fault if she had up part of her mainsail. To apply such rule is to do no more than to require of the captain of the schooner the exercise of that measure of care and skill which is incumbent on the tow. *The Margaret*, 94 U. S. 496; *The Margaret*, 5 Bissell, 357. In the latter case it is said there are certain duties incumbent on those who have the management of the tow. It is the duty of the tow to be steered properly; to follow in the wake of the tug, and to perform all those duties which nautical skill demands in order to properly manage the tow.

It is manifest that if the tow, at a critical point, when about to enter the harbor, carries such sail as to take her out of the control of the towing craft, either as to her headway or course, the tug should not be held at fault for any disaster that ensues.

We entertain the opinion that the libel should be dismissed, and decree accordingly, with costs to claimant.

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MORGAN v. GILBERT.

CIRCUIT COURT—WESTERN DISTRICT OF MICHIGAN—APRIL
22, 1880.

MORTGAGEOR INSOLVENT—WHAT MORTGAGEE MAY DO.

If the mortgageor is insolvent, the mortgagee may, where there is an unauthorized injury to the mortgage security, maintain an action

The action was trespass on the case.

Simonds & Fletcher represented the plaintiff.

Champlin & More, the defendant.

WITHEY, J.—On the second of January, 1875, the members composing the firm of Colby & Co., owned and mortgaged lands to plaintiff to secure the payment of \$25,000; among other lands lot No. 2, of section 10 north, of range 7 west, situated in Montcalm county, Michigan, on which was pine timber constituting the principal value of the premises. Ten thousand dollars, with interest, were payable July 2, 1876, and (\$15,000) fifteen thousand, with interest, January 2, 1877. In January, 1878, while the mortgage remained wholly unpaid, defendant entered upon said premises, and cut and removed 600,000 feet, board measure, of pine timber, of the value of \$1,300, or two dollars per 1,000 feet. It was without the knowledge of plaintiff, who alleges that thereby defendant "greatly injured and damaged said premises," etc., "whereby the plaintiff's security for the said sum of \$25,000 and interest was greatly lessened, impaired and destroyed, to plaintiff's damage," etc.

Defendant pleaded the general issue.

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It appears that defendant and the mortgageors, after the date of the mortgage, agreed to exchange the pine upon their respective lands for convenience in hauling, defendant to pay \$1,000 as the difference in value; he to have the pine in question. Defendant paid part of the \$1,000 to the mortgageors, Colby & Co., and the balance was subsequently paid to their assignees in bankruptcy.

When the mortgage was given there were over 13,000,000 feet of pine timber on the mortgaged land. At the time defendant took the timber in question from this particular lot, the quantity remaining on the entire tract had been reduced to about 6,500,000 feet by Colby & Co., in their lumbering business, and with the knowledge and consent of plaintiff, but upon an understanding between them not necessary or material to be stated.

It further appeared that at the time of the agreement to exchange timber, defendant was informed by Colby & Co. that they had no right to permit the timber to be cut without the consent of the mortgagee.

There was a prior mortgage upon the lands covered by plaintiff's mortgage of \$10,000, which plaintiff bought for \$6,000, subsequent to the alleged trespass, and caused to be discharged of record.

Pending a suit by the mortgagee to foreclose the \$25,000 mortgage, and prior to bringing this suit, but subsequent to the alleged trespass, he accepted a quit-claim deed of the mortgaged premises from the assignees in bankruptcy of the mortgageors, whereby the mortgage and the debt became merged in the fee thus acquired.

At the time the timber was taken there was due on the mortgage, of principal and interest, about \$32,875; amount plaintiff paid for prior incumbrance \$6,000; making, as the total lien, \$38,875.

The value of the security is shown to have been as follows:

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On the mortgaged land was a steam mill worth....	\$20,000
Six million, five hundred thousand feet of pine timber, at two dollars	13,000
Value of the land without the timber.....	1,964
	<hr/>
	\$34,964

From which it appears the value of the security did not equal the amount of the lien by nearly \$4,000.

The declaration counts upon damages to the premises and to plaintiff's security, and it is claimed, that any reduction of the mortgagee's security gives the right of action. We are of the opinion that, if plaintiff can recover, it must be for an injury to his security, and on the ground that it was inadequate. In Massachusetts the legal title is in the mortgagee, who may sue for an injury affecting the mortgaged estate, though not in possession, and the owner of the equity of redemption has no more right than a stranger to impair the security of a mortgagee by permanent injury and depreciation of the mortgaged estate. It has there been held that the damages are measured by the extent of injury to the property, and do not depend upon proof of the insufficiency of the remaining security; that the mortgagee is not obliged to accept what remains, but is entitled to the full benefit of the entire mortgaged estate for the full payment of his entire debt. *Gooding v. Shea*, 103 Mass. 360; *Byron v. Chapin*, 113 Id. 308. See, also, *Sanders v. Reed*, 12 N. H. 558; *Smith v. Moore*, 11 N. H. 551; 5 N. H. 54; and *Hutchins v. King*, 1 Wall. 54. But in *Kings v. Bangs*, 120 Mass. 514, it was held, in an action by the mortgagee against one who had injured the mortgaged property by removal of fixtures, that evidence that the mortgagee under the power in his mortgage sold the premises for more than enough to pay his debt and all prior incumbrances, is admissible in mitigation of damages.

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In Illinois the mortgagee is held to be the owner of the fee, as against the mortgageor or those claiming under him, and may have an injunction to stay waste upon the mortgaged lands. He is entitled to all the rights and remedies which the law gives to an owner. *Nelson v. Pinegar*, 30 Ill. 473.

In New York a mortgage constitutes a lien upon and does not vest title to the land in the mortgagee. This is the law in Michigan, where the title remains in the mortgageor. Wherever such is the relation of mortgageor and mortgagee to the mortgaged property, the rule is that the mortgagee may maintain suit against one who impairs his security, and the damages are limited to the amount of injury to the mortgaged security, however great the injury to the land may be. *Van Pelt v. McGraw*, 4 Comstock, 110. It has been, in some cases, held necessary to show that the mortgageor is insolvent or not personally responsible for the debt. See *Gardiner v. Heartt*, 3 Denio, 232; *Same v. Hitchcock*, 14 John. 213; *Yates v. Joyce*, 11 John. 136; *Wilson v. Maltby*, 59 N. Y. 126; *Jones v. Costigan*, 12 Wis. 757; *Buckout v. Swift*, 27 Cal. 436.

Upon the general doctrine as stated, where title remains in the mortgageor, see *State v. Weston*, 17 Wis. 757; *Jones v. Costigan*, 12 Wis. 757. *Jackson v. Turrell*, 39 N. J. 329, is a well considered case. It is not necessary to say what the rule would be in Michigan in a suit by a mortgagee, when the mortgageor is personally liable and pecuniarily responsible. In the case at bar the mortgageors are insolvent. One case lays stress upon the intent with which the injury was committed, (*Gardiner v. Heartt*, 3 Denio, 232,) which we do not follow.

We are not aware of any decision by the Supreme Court of Michigan, touching the right of a mortgagee to maintain an action for an injury either to the mortgaged premises or

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to his security. We entertain no doubt that the common law gives a remedy to a mortgagee against one who, by an unauthorized act, has so far injured his security as that damage results. The cases in New York, New Jersey, and Wisconsin, where the rights of a mortgagee are the same as in Michigan, are authority for this view. The court, therefore, finds that the plaintiff is entitled to judgment against the defendant for the sum of \$1,300. It is also found that defendant had no valid license from the mortgageors, as against the mortgagee, to cut and remove timber from the mortgaged land.

The plaintiff is entitled to judgment against the defendant for the sum of \$1,300. Judgment will be entered for that amount, with costs.

The Ira Chaffee.

THE IRA CHAFFEE.

DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—APRIL
26, 1880.

BREACH OF CONTRACT OF AFFREIGHTMENT—LIEN.

The cargo, or a portion thereof, must be actually put on board a vessel, or it must be delivered to the master as master, before there can be a lien upon the vessel for breach of contract of affreightment in favor of the owner of such cargo.

Libel in rem.

The libel claimed damages for breach of contract, alleged to have been made by the master of the Ira Chaffee. The allegation was that he failed to carry a boiler to Oscoda, which was to have been taken from Detroit. The fact was that while the captain received it for and on account of a schooner on which it was placed and carried to its destination, he had nothing to do with it as master of the Ira Chaffee. The proof showed that the boiler was delayed by reason of ice. The proceeding was by attachment.

James J. Atkinson, for libellant.

Moore, Canfield & Warner, for respondent.

BROWN, J.—Upon the argument of this case I was satisfied, from the correspondence of the parties, that a legal contract of affreightment had been made, but that nothing had ever been done by the propeller toward its execution. The boiler was never laden upon the propeller, nor delivered to any one having authority to receive it on her behalf. The question of jurisdiction was reserved.

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There is an abundance of *dicta* to the effect that the obligation of the cargo to the ship, and of the ship to the cargo, does not arise until the cargo or some portion of it has been laden on board, or at least legally delivered to the vessel, but no case directly in point has yet been decided by the court of last resort.

Whatever be the rule with regard to contracts of affreightment, which are purely executory, it must now be considered as settled that if the ship enters upon the performance of its work, or any step has been taken towards such performance, the ship becomes pledged to the complete execution of the contract, and may be proceeded against *in rem* for a non-performance. Such was the view taken by Judge EMMONS in the case of *The Williams*, 1 Brown's Adm. 208; and although the court went much further in that case, and held that every maritime contract, from the moment of its inception, pledged the vessel to its complete performance, the case cannot be considered as a controlling authority for this proposition. In that case a tug was hired to go to the assistance of a vessel which had been reported aground on the shore of Lake Huron. On arriving at the spot it was found that the vessel had been gotten off, and the tug returned home without rendering her any actual assistance. It was held that a proceeding *in rem* would lie to recover the stipulated compensation. I have no doubt whatever of the correctness of this ruling. I have had occasion myself to apply the same doctrine in several cases which have arisen in this district since I have been upon the bench. Judge BAXTER also adopted it in the recent unreported case of *The Melissa*.

Prior to the decisions of the Supreme Court in the case of *The Freeman*, 18. How. 182, and *The Yankee Blade*, (in *Vanderwater v. Mills*), 19 How. 82, the question of jurisdiction in the cases of executory agreements was un-

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settled, and even those cases cannot be said to have definitely fixed the measure of liability. They seem rather to have announced in general terms a doctrine from which the Supreme Court have not as yet shown any disposition to recede.

The question does not seem to have been settled in England, although in the case of *The City of London*, 1 Wm. Robinson, 88, Dr. Lushington was disposed to concede that "if a seaman is engaged on board a vessel, and the owners think fit to abandon the voyage for which the seaman has been engaged, he would not be entitled to sue in admiralty for his redress, but must seek his remedy at common law, by an action on the case." This is the only intimation I have found upon the subject in the English admiralty, probably owing to the fact that it had no jurisdiction over contracts of affreightment until recently. The case of *The Schooner Tribune*, 3 Sumner, 144, decided by Mr. Justice STORY, favors the view taken by the libellant here. This was a contract under which the Tribune engaged to be ready within three days to load for the libellant, and proceed without delay to Lubec to take in a cargo, and proceed to Havana. After this memorandum was made a number of cedar posts were put on board of her by the libellant, as a part of her cargo, but before the schooner sailed the owners of the vessel ordered the cargo so laden to be put on shore, and attached it under process for an asserted debt due them on a former voyage, for which they insisted libellant was liable. The charterer proceeded against the vessel, and Mr. Justice STORY held her liable—*First*, upon the ground that the agreement constituted a charter and not a preliminary contract; and, *second*, because a portion of the cargo was actually taken on board, and the voyage was voluntarily broken up by the owners of the vessel. Here, again, however, there was a part performance, which was evidently considered a

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material fact, although the opinion is not expressly put upon that ground. Indeed, the court intimates (page 149) that the question of jurisdiction depended rather upon the maritime character of the contract.

The case of *The Flash*, Abbott's Adm. 67, was very similar. The master of a New York vessel contracted at the port of New York to transport a cargo across the East river to Brooklyn. He took a part of the cargo on board, but afterwards refused to take on the residue or to deliver that already laden. It was held that an action *in rem* would lie, both for the refusal to receive on board and the refusal to deliver. While a portion of the cargo was actually laden on board, the court apparently sustained the jurisdiction (page 70) upon the authority of the master to contract for the employment of the vessel, and upon the general doctrine of the maritime law that the vessel is bodily answerable for such contracts of the master made for her benefit. In the case of *The Pacific*, 1 Blatch. 569, the libellant had contracted for a passage to California; had prepared for the voyage at a considerable expense, went to New York at the time appointed for sailing, and found that the accommodations were not such as he had bargained for, and the vessel was overcrowded and dangerous to life. He declined to embark and demanded back his passage money, which was refused. He then filed a libel *in rem* for a return of the passage money and for his damages. Objection was made to a recovery upon the ground that at the time of the filing of the libel no cause of admiralty cognizance had arisen; that to give jurisdiction over a maritime contract the ship must have entered upon the performance, and the breach must have occurred in the course of the performance. Mr. Justice NELSON held this objection untenable, and said that the obligation resulted directly from the contract and not from the performance, which is simply in fulfillment and discharge of

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it. "The owner is bound as soon as he or the master settles the terms upon which the ship is to enter upon the service, and it is difficult to perceive why the liability of the latter should be postponed till the inception of the performance." The reasoning of this case is, undoubtedly, in favor of the libellant. But it would seem that the decision might also be supported upon the ground that the libellant himself had partly performed his contract by the payment of his passage money, and his preparations for settlement in California. I do not deem the case inconsistent with the other authorities, which hold that in cases of purely executory contracts the libellant cannot proceed against the vessel.

All of these cases were prior to those of the *Freeman* and *Yankee Blade*. In the case of *The Freeman*, 18 How. 182, the question arose as to the liability of the ship for contracts made upon the faith of fraudulent bills of lading, given by the captain for property purporting to have been shipped on board. In delivering the opinion Mr. Justice CURTIS observed: "The law creates no lien on a vessel as security for the performance of a contract to transport cargo until some lawful contract of affreightment is made, and a cargo is shipped under it." The case did not call for this opinion, and it must be considered as a *dictum*. At the same time it has been repeated so often in the same court, and has been so often acted upon as the doctrine of that court by courts of inferior jurisdiction, that it is difficult to say that it must not now be considered as settled law. In the case of *The Yankee Blade*, 19 How. 82, there was a contract between the owners of certain steamboats, of which the *Yankee Blade* was one, to convey freight and passengers between New York and California. Among other things it was agreed that the *America* should proceed to Panama, and the *Yankee Blade* should leave New York at such time as to connect with the *America*. The owner of the *Yankee Blade* refused

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to employ his vessel according to this agreement, and sent her to the Pacific under a contract with other persons. For this breach of contract the libellant sued, assuming the vessel subject to a lien, which might be enforced *in rem*. The court held this contract to be nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers, and that the mere fact that the transportation was by sea was not sufficient to give a court of admiralty jurisdiction. In delivering the opinion Mr. Justice GRIER said, in commenting upon the reciprocal obligations of the ship and cargo: "If the cargo be not placed on board it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of contract by the owners, but must resort to his personal action for damages, as in other cases. The case did not necessarily call for the expression of this opinion, as the contract was not, properly speaking, maritime."

Since these cases were decided I have found none in which the courts have sustained a libel upon a purely executory contract, except that of *Oakes v. Richardson*, 2 Lowell, 178, which was *in personam*. In *Rich v. Parrott*, 1 Cliff. 55, Mr. Justice CLIFFORD, in alluding to these cases, intimated the opinion that, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive the cargo, the charterer has no privilege or lien on the ship for such a breach of contract by the owners, but must resort to his personal action for damages. The case, however, went off upon another point. In *The Hermitage*, 4 Blatch. 474, the charterer put a cargo on board, and then took it out and

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for the satisfaction of such lien. If the jurisdiction is sustained in this class of cases it ought also to include cases of contract to repair the vessel or supply her with stores, in which the material man would be entitled to a lien, though nothing had been done under the contract. I find it impossible to say with Judge EMMONS, in the case of *The Williams*, that the *dicta* in *The Freeman* and *The Yankee Blade* are "now expressly overruled." While the point has not been directly adjudicated in the court of last resort, I find no intimation in any of the latter cases of a disposition on the part of that tribunal to recede from the doctrine there announced.

The continental authorities are explicit to the effect that there is no privilege upon the ship until the goods are laden on board. Indeed, they seem to go further, and hold that even after they are shipped they may be withdrawn by the freighter at any time before the vessel breaks ground. By section 191 of the French commercial code, among the debts which are termed privileged are damages due to shippers for a failure to deliver merchandise which they have put on board, or for reimbursement of injuries suffered by the cargo through the fault of the captain or crew. By section 280 the ship, her tackle and apparel, the freight and the cargo are respectively bound to the covenants of the parties. These sections are substantially repeated in the codes of Belgium, secs. 191, 280; Italy, secs. 285, 288; and Spain, secs. 596, 797.

In commenting upon these provisions Dufour observes, (1 Maritime Law, 325:) "With regard to cases which give birth to a privilege in favor of the shippers it will be seen that by the code they are limited to two, viz., damages: *First*, for failure to deliver the merchandise shipped; *second*, for reimbursement of the damages suffered through the negligence of the captain or crew." These are the same theories that

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obtain in the *Consolato del Mare*, as the foundation of the privileges of merchants, and experience has not indicated that it is necessary to extend them to other cases. I believe, then, that I ought to add, with Valin, that this disposition is limited. Thus, although article 280 declares that the ship is bound to the performance of the charter-party, this obligation does not confer a lien in favor of the merchant, if the non-performance of which he complains does not fall within one of the cases provided by our article, (191.) Valin cites as example, in this regard, the damages obtained by a shipper who, upon the occasion of the seizure of the ship or otherwise, has been obliged to withdraw the merchandise which he has put on board, or has been hindered from completing his lading. It is evident that in this regard, adds Valin, his debt is simple and ordinary, without any sort of privilege.

Caumont, in his Dictionary of Maritime Law, title, "Armateur," p. 234, section 54, says: "Article 280 of the code of commerce is limited to cases specially provided for by article 191, either to damages due the shipper for failure to deliver the merchandise taken on board, or for injury done it by the negligence of the captain. Aside from these cases, and especially when no merchandise is laden on board, there is no room for a lien upon the vessel, although the shipper might obtain, by judgment, an allowance for damages for the non-performance of the contract of affreightment."

See, also, 2 Boulay Paty, Droit Com. et Mar. 299, cited in *The Yankee Blade*, 90; 1 Hoecheater et Sacre, Droit Mar. 74. In 2 Malloy, c. 2, section 2, the law is stated as follows: "And, therefore, so soon as merchandise and other commodities are put aboard the ship, whether she be riding in port, haven, or any other part of the seas, he that is *excitor navis* is chargeable therewith.

I think the law is too well settled to be disturbed. The libel must be dismissed.

Bateman v. Fargason.

BATEMAN v. FARGASON.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
MAY, 1880.

1. FRAUD—WHEN PLAINTIFF IS REPELLED FROM A COURT OF EQUITY.—A plaintiff will not be repelled from seeking relief in a court of equity on the maxim that he who comes into equity must come with clean hands, unless the particular transaction in regard to which he seeks relief is made up in part by fraud in him.

2. COERCION OF WIFE TO SIGN DEED—BILL TO SET ASIDE SETTLEMENT AND PURGE USURIOUS ACCOUNT.—Where the plaintiff confessed, on a bill filed to set aside a settlement and purge the transaction of usury, that he had coerced his wife to sign the deeds conveying land: *Held*, that this did not repel him from coming into a court of equity for the assertion of his rights.

The facts fully appear in the opinion.

George Gantt and *W. D. Beard*, for plaintiff.

Taylor & Carroll, for defendant.

HAMMOND, J.—This is a bill to re-open the settlement of an account on the ground of usury, undue influence, and violated confidence, amounting to an alleged fraudulent imposition by the defendant upon the plaintiff. It appears by the bill that the plaintiff and defendant were joint owners of a plantation, the plaintiff managing the property in the business of growing cotton, which was sent to the defendant for sale, he being a commission merchant; the supplies to furnish the plantation being supplied by the defendant from his stock of merchandise, or otherwise, and charged to the joint account. The account also contains items of money

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advanced to the plaintiff to pay for his share of the purchase money of the plantation. The parties had a settlement, and the plaintiff appeared to be indebted to the defendant in the sum of \$20,000. To secure this the plaintiff executed a mortgage on his share of the land, and subsequently an absolute deed in full payment; his wife joining in the conveyance for the purpose of releasing her dower and homestead rights.

The plaintiff alleges that he procured this acquiescence of his wife by coercion, setting forth in detail his angry denunciations of her for her remonstrances, and his threats to have defendant, whom she greatly disliked, appointed guardian for her children, and such other like conduct as procured her signature to the deeds. The bill is demurred to because of this allegation of coercion and confession of fraud upon his wife, and the maxim is invoked that "He who comes into equity must do so with clean hands." The principle indicated by the maxim only applies to the conduct of the party in respect to the particular transaction under consideration, for the court will not go outside of the case for the purpose of examining the conduct of the plaintiff in other matters, or questioning his general character for fair dealing. Bisph. Eq. 61. It does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be depravity in a *legal* as well as moral sense. *Deering v. Winchelsea*, 1 Cox, Ch. 318; *Nichols v. Cabe*, 3 Head, 92; *Sharp v. Caldwell*, 7 Humph. 415; *Mulloy v. Young*, 10 Humph. 298; *Kelton v. Millikin*, 2 Coldw. 410; *Lewis' Appeal*, 67 Penn. St. 153, 166.

If it be conceded that the coercion of the wife is evidence of moral turpitude—and certainly no court can, at this day, do less than severely reprehend such conduct—still, the plaintiff will not be repelled unless the iniquity complained of in him is connected with and a part of the very transac-

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tion as to which he seeks relief. It seems to me plain that, while the coercion of the wife was a method of perfecting the defendant's title to the land, and in that sense connected with the transaction, it is not a part of it. The subject of controversy is the usury in the account, and the other alleged false and fraudulent items as to which there is said to have been an unfair settlement.

The land was given in payment, and the deeds made to effectuate the payment are recited in the bill; the relief asked being to correct the settlement, and to hold it as payment only for so much as is actually due; charging the defendant as trustee for the balance. The case stands as if money had been paid in settlement of defendant's account, and we should be asked to repel the plaintiff because it appeared that he procured the money from some third party—his wife, for example—by questionable and, it may be, fraudulent practices. I do not see that such a case falls within the maxim or rule of equity invoked by the demurrer.

The object of the bill is to surcharge and falsify the merchandise account, and no relief is asked because of the allegation of coercion of the wife. It might afford her a ground for relief, and she is made a defendant, as are her children; for what purpose it does not appear, unless to enable them to file a cross-bill to recover their alleged dower and homestead rights. But no relief is asked against them; they have not appeared, and no process has brought them here. The case must, therefore, be determined alone as between the plaintiff and the defendant, Fargason.

Mr. Spence, in treating of this and the kindred maxim that "He who asks equity must *do* equity," gives some curious illustrations of its application in ancient times, when the chancellor, as a condition precedent to giving the plaintiff relief, would require him to ask pardon of the defendant, to withdraw slanderous words, to be dutiful to his

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parent or uncle, and in one case to publicly on his knees ask forgiveness of the defendant; all required because of some depraved conduct by the plaintiff. But even in these cases the wrong redressed was to the defendant and not a third party, and Mr. Spence says they are cited, not as precedents, but curiosities of the law. 1 Spence Eq. Jur. 424, and note.

The cases cited by the learned counsel for the defendant all show that the plaintiff was seeking advantage of, or relief from, the bad conduct with which he was himself charged. *Creath v. Sims*, 5 How. 192; *Wheeler v. Sage*, 1 Wall. 527; *Bleakley's Appeal*, 66 Pa. St. 191.

The case of *Wheeler v. Sage*, *supra*, so much relied on in argument, was a case where the plaintiffs had been disappointed in expected profits of a fraudulent transaction by the desertion of their confederate, whose greed induced him to take the whole for himself. Relief was refused, so far as the doctrine now under consideration was applied, because, to have given them relief would have been to sanction the nefarious transaction in the court. No such result will ensue in this case.

Demurrer overruled.

Washburn v. The Miami Valley Ins. Co. et al.

WASHBURN v. THE MIAMI VALLEY INSURANCE
COMPANY AND OTHERS.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—MAY, 1880.

1. CONDITION IN POLICY OF INSURANCE AS TO EXPLOSION.—A policy of insurance against loss by fire had a provision to the effect that the company was not to be liable for loss or damage caused by explosion of any kind unless followed by a fire, and only then to the extent caused by the fire. A fire broke out in the property insured against; this produced an explosion, the result of which caused the property to be destroyed: *Held*, that the policy covered the loss by fire.

2. EXCEPTIONS AS TO ANY EXPLOSIVE SUBSTANCE BEING KEPT IN THE PREMISES.—The company inserted an exception in the policy to the effect that it would not be liable for loss or damage occasioned by any explosive substance except only for such fire as would result therefrom, nor would it be liable for that unless the privilege be given in the policy to keep such articles. There was in the premises an explosive material known as flour dust, which exploded on being reached by an outside fire, destroying and consuming the premises: *Held*, that there was nothing in the terms of the policy which withdrew protection against fire, although that fire should involve an explosion. The intention and meaning of the parties constitute the contract, and the policy, like all other instruments in writing, must be construed in the light of surrounding circumstances. The company took the money of the assured, when it knew or ought to have known that the property had connected with it more or less of this explosive substance, and it could not have intended to do this if, according to the terms of the policy, it was known to possess no validity whatever. Hence this particular "explosive substance" must be construed as not within the terms or meaning of the particular language of the policy upon that subject.

The facts are fully stated in the opinion.

Sage & Hinkle, for plaintiff.

Wm. M. Ramsey and *Thomas McDougall*, for defendants

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SWAYNE, J.—The policy issued by the Miami Valley Insurance Company contains the following clauses, upon the first of which this controversy is understood to turn, so far as that company is concerned: "Provided, etc., that this company shall not be liable for loss, etc., by lightning, or explosion of any kind, including steam boilers, unless fire ensues, and then for the loss or damage by fire only." And the second clause to which I wish to refer is as follows: "Gunpowder, saltpeter, phosphorus, petroleum, naphtha, benzine, benzole, or benzine varnish, are positively prohibited from being deposited, stored, or kept in any building insured or containing property insured by this policy, unless by special consent, in writing, indorsed on this policy, naming each article separately; otherwise the insurance shall be void."

The policy issued by the Fidelity Fire Insurance Company contains the same clauses. They are as follows: "Or if the assured shall keep gunpowder, fire-works, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish; to keep or use camphine, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then, and in every such case, this policy is void."

Then follows the clause upon which, as respects this company, the controversy turns. The exception is in these words: "The company shall not be liable, etc., for any loss caused by the explosion of gunpowder, or any explosive substance, nor explosion of any kind, unless fire ensues, and then for the loss or damage by fire only," etc.

The language of the policy issued by the Union Company, touching these exceptions, is as follows: "This company will not be liable for the loss or damage occasioned by the explosion of a steam-boiler, gunpowder, or any other explosive substance, except only such loss as shall result from fire that may ensue therefrom; nor shall the company be liable for any

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loss by such fire, unless privilege shall have been given in the policy to keep such articles," etc.

That makes the case very peculiar as to the Union Company. Giving a literal view to the language of the second clause, which I have just read, the policy was void at the outset, and never had any validity, because there was in the mill from the first an explosive substance, to-wit, flour dust, and there was no permit given in the policy to keep such substance.

Now, according to the theory contended for by the defense, the company never in legal effect insured the property which is named in the policy, and was known to have connected with it necessarily more or less of this explosive substance, and yet the company took the money of the assured, when it knew, or ought to have known, that according to the terms of its policy it had no validity whatever. Now, I cannot suppose that that was the intention of this company. The policy must be construed, like all other instruments in writing, in the light of surrounding circumstances; and I am willing to construe this particular "explosive substance" as not within the terms or meaning of the particular language of the policies upon that subject. I shall construe it, as if the language was the same, or substantially the same, as that upon the subject in the other policies. But I do not see, if the microscopic eye of a special demurrer was applied, why the gentleman for the defense might not as well contend that this policy had no validity, as that it had no validity so far as the effect of the explosion is concerned in the results that followed. But, as I do not take that view of the subject, I shall not apply that principle. Now, certain remarks are to be made in the light of the clauses which have thus been read, construing the last one reasonably, in the light of the circumstances surrounding the parties when the contract was entered into, and which are material to be borne in mind.

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It will be observed that the companies are protected, with respect to explosives, by making it fatal to the policies to keep them; the policies become void if such explosives are kept. Perhaps, right here, I might remark that that word "kept" must have a particular signification in this connection, and that it does not apply where explosives of a known fixed character, known to be such, were accidentally present in the structure insured; but it does apply where they were kept there knowingly, in violation of the terms which the policy contains with reference to them. That must have been the understanding or intention of the parties in reference to the peculiar substance flour dust, which is highly explosive, but which, as I have remarked, was necessarily present, and from which arose the genesis of the explosion out of which this controversy has arisen. The company had taken care to secure itself against the perils of explosion: *First*, by a comprehensive stipulation in the policy; *second*, the exceptions referred to are named only in connection with *fires which they have produced*. That is in the clause on which the controversy turns. And, by the way, the second clause I have read is the only clause to which counsel have referred. Nothing was said about the other provisions which I have read.

I repeat, explosives are named only in connection with fires which they have produced. There is nothing said about them in connection with fires which have produced them. The policies on that subject are wholly silent. Is not this somewhat remarkable, if the construction contended for by the companies be correct? In that case would not the language of the context have naturally been that the company will not be liable for explosions, and will not be liable for fires which produce them; or fires which they have produced? The first may define the liability of the company, and the sentence I have just read is certainly important. Would not

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the policies have read "that they will not be liable for explosions caused by fires, or for fires caused by explosion?" I repeat, and it is a feature of great significance in the case, as it seems to me, that where explosions are produced by fires—accidental fires—the policy is wholly silent. Now, I am free to remark that it seems to me that this could hardly have been so if the intention of the parties had been, as is contended for by the counsel for the defendants.

But, further, if it be suggested that this would leave the exception without any legal effect, I would say that there are several obvious answers. First, these clauses are frequently prepared by non-legal men, who do not know the legal effect of the language which they employ in such instruments, and I will add that these instruments go into the hands of individuals who know nothing of the legal effect of these special clauses which they contain. Again, if prepared by a legal hand, the writer may not have known, probably did not accurately know, the state of the law touching the subject to which the exception, and the exception within the exception, here in question, relate. Again, there is nothing which in terms, and this is substantially what I have said already, withdraws the exception here in question from the clause of insurance, as it would be if the construction contended for by the plaintiff's counsel be sustained. There is nothing disclosed which tends to withdraw the subject of these exceptions (nothing in terms, there may be by implication) of the clause here in question from the general language and operation of the clause employed. They refer to fires which the explosion shall produce, and are wholly silent as to the fires which produce such explosions.

Again, insurance policies, like all other written contracts, are to be reasonably construed; yet, as with respect to all other written contracts, insurance policies are to be construed

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most strongly against the party making them, which, in this case, is the insurance company.

I deem it proper to advert for a moment to the case in 7 Wallace, (*Ins. Co. v. Tweed*, 7 Wall. 44,) which I did not fully understand at the argument. The exception was somewhat similar, and the fire happened in that case from an explosion, producing a fire at a distant point from the site of the insured property. A wind prevailed at the time, and swept the fire a considerable distance, and the property insured, and covered by the policy, was destroyed by fire. The company was sued, and it defended on the ground that the case was covered by the exception, which was that the company should not be liable for a fire produced by an explosion. That policy was at the opposite pole from the one here under consideration, and the assured was defeated. He recovered nothing. No doubt he thought that very unreasonable, as it seems to me most persons would regard it. He intended, no doubt, to have his property protected by that policy, and supposed it was protected. The Supreme Court of the United States held from principle that it was not.

It is very possible that the conditions of this clause (which were frequently brought to my attention, for I had a great deal to do with this head of the law, practically) had produced a good deal of dissatisfaction, and hence this clause was changed. If that policy had been the same in this particular as those under discussion here, then, irrespective of the question of explosion, the party would have been entitled to recover; but, the policy being different, the result was different. A change was made, probably having its origin in that case and others like it—a change was made to meet that difficulty, and hence it is, perhaps, we have these policies phrased as they are before us.

Now, to recur again to the proposition to which I adverted

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at the outset, to-wit, that there is nothing here which in terms withdraws the protection against fire, although that fire should involve an explosion. It seems to me that there would have been language to that effect, if such had been the intention of the parties. The intention of the statute constitutes the law; the intention of the law-makers constitutes the law; the language may be within the letter of the statute and not within its meaning, and the language may be within its meaning and not within its letter. That is a familiar proposition. If we can ascertain the intention and meaning of the parties here, that constitutes the contract which it is the object of the court to carry out. Now, there is another remark, perhaps rather hypercritical, but proper in this connection to be made, and that is, according to the technical formality of the law of insurance this explosion cannot be recognized. It was a part of that fire—just as much a part of the fire, and admitted to be as such, covered by the insurance, as if there had not been an explosion, by the general language, “insurance against fire.” If the exception had not been made, it would have been considered (which was conceded at the argument) a part of the fire, and the policy would have been held, for the purpose of this view of the case, just as effectual, as it regards the effects of the explosion produced by the fire, as the policy is now effectual with respect to fires produced by an explosion, upon which the language of the policy is express. Now, I think, under the circumstances of this case, that that view of the subject is entitled to very considerable consideration.

But there is another matter to be considered which has very great weight in the case. I am free to confess that, viewing this policy in its own light, I might doubt very much more than I do; but this subject has been litigated very fully before a very able and learned judge, a great lover of the authorities, and perhaps as much influenced by them as any

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judge to be found. I refer to the district judge of Michigan. *Washburn v. Union Fire Ins. Co.*, U. S. Cir. Court, E. D. Mich., BROWN, J., (see *Detroit Post & Tribune* of Nov. 8, 1879.) It seems he had no hesitation in coming to the conclusion that the insurers were liable under policies drawn like this, and for the purposes of this action identical with these in the cases before me. The same question was in several cases before the learned circuit judge of the Pennsylvania circuit, (*Washburn v. Artisans' Ins. Co.*; *Same v. Penn. Ins. Co.*, U. S. Cir. Court, W. D. Penn. 9 Pittsburgh Legal Journal, (N. S. 55,) and, without the slightest doubt or hesitation, he ruled in the same way in a case involving the same question. And they were afterwards before the district judge of this district, (*Washburn v. Farmers' Ins. Co.*, U. S. Cir. Court. S. D. Ohio, 2 Fed. Rep. 304; *Washburn v. Western Ins. Co.*, U. S. Cir. Court, S. D. Ohio, October term, 1879, SWING, J.) and he ruled in the same way.

Now, I must say that, under these circumstances, upon a mere doubt, and technical criticism and objection, of the importance of those which have been urged upon my attention, I am not quite bold enough to overrule these adjudications. In my judgment, they decide the question before me. I do not mean that the views of these gentlemen are in anywise conclusive—not at all; or that the same result would follow if a like adjudication had been made by one of my peers and brethren, or any number of them. But there is, doubtless, a moral binding force in the very indications to which I have adverted, which gives them a sufficient amount of gravity in my judgment, and rightfully gives it to them, to turn the scale of this case in favor of the plaintiff, and judgment will be rendered accordingly.

Judgment for plaintiff for amount of policies and interest.

Dinsmore v. L., C. & L. R'y Co.—So. Ex. Co. v. N., C. & St. L. R'y Co.

WILLIAM B. DINSMORE, AS PRESIDENT OF THE ADAMS
EXPRESS COMPANY, v. THE LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY.

CIRCUIT COURT—DISTRICT OF KENTUCKY.

THE SOUTHERN EXPRESS COMPANY v. THE
NASHVILLE, CHATTANOOGA & ST. LOUIS
RAILWAY COMPANY.

CIRCUIT COURT—MIDDLE DISTRICT OF TENNESSEE—MAY 24,
1880.

1. RAILROADS AND EXPRESS COMPANIES.—Railroads are *quasi* public institutions. They are authorized to facilitate and not to control or force from legitimate and natural channels, or hinder or obstruct, the business of the country.

2. DUTY TO CARRY FOR EXPRESS COMPANY.—The duties and office of railroads and express companies are widely different and wholly distinct. The first was created to furnish motive power and to receive and carry such freight as is appropriate to such a mode of transportation. But it was never contemplated that they should carry money or such valuable articles as required special care and attention during their transportation. Much of the service rendered by express companies and appropriate to their functions, is not by law imposed on railroads. They were not created to do an express business, are not suited to such service, and possess no legal capacity to engage in it; nor can they legally refuse to carry for complainant and extend to its messengers and agents all facilities hitherto furnished.

3. COMMON CARRIERS.—As common carriers railroads are as much bound to carry for another common carrier as they are to carry for other persons, and the carriage of such goods is in the strict line of railroad duty.

4. ESTOPPEL.—Where defendant for a long time acquiesced in complainant's right to have its freight so carried by it, as an express carrier, it is estopped from exerting its authority to exclude it now; (not admitting its right to do so, however, in any event.)

The Louisville, Cincinnati & Lexington R. R. Co. notified, May 26, 1880, the Adams Express Co. that the con-

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tracts for the transportation of express matter for that company would be terminated on April 20, and that it would thereafter exclusively carry for the Union Express Company. A somewhat similar notice was likewise given by the Nashville, Chattanooga & St. Louis R. R. Co.

The express companies thereupon brought suits, praying for an injunction restraining said companies from interfering with or disturbing their business, and to compel them to furnish, as before, the same facilities, etc. A preliminary injunction was granted, which included also the Mobile & Montgomery and the L., N. A. & C. R. R. Co.

The first application for such injunction was heard before Mr. Justice HARLAN at Indianapolis, by whom the injunction was granted as prayed. The second application came on for hearing in the above entitled suits before the honorable JOHN BAXTER, at Louisville, Ky., on the 24th of May, 1880.

The defendants severally produced affidavits showing that their exclusive contracts with the Union Express Company had been abandoned; that such company had been virtually dissolved, and that the defendants were then conducting, or were about to conduct the express business over their lines in their own names and on their own account, and they severally claimed that they were legally entitled so to conduct such business, and that they could not be compelled to allow the existing express companies to participate therein or to compete therewith, or to accord to them any railway facilities or privileges whatever.

The cases were argued on behalf of the express companies by Messrs. *Stanley Matthews*, *Clarence A. Seward* and *F. E. Whitfield*, and on behalf of the defendant by Messrs. *Dodd*, *Bruce*, *Barnett*, *E. H. East* and *Russell Houston*.

After advisement the following opinion was pronounced by

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BAXTER, J.—The case against the Nashville, Chattanooga & St. Louis Railway will be first disposed of. We have not time to state fully and in detail all the reasons for the decree we feel bound to enter in this case. The question is both novel and interesting as well to the public as to the parties, and may be thus stated:

The express business, as it is understood and carried on in the United States, was initiated in 1839. About that time, one Alvin Adams began the carriage of small packages of value between the cities of Boston and New York over the line of the Boston & Worcester railroad, and the line of steamers connecting therewith, and plying between New York and Norwich. His enterprise proved remunerative. His success induced others to establish and maintain similar express lines between New York and Philadelphia, and Philadelphia and Baltimore, and other important commercial points. These all succeeded well, grew into general favor, and continued in active operation until July, 1854. At this time, by the mutual consent of the parties interested, these several express companies were consolidated and merged into the Adams Express Company, a voluntary association or partnership, which was formed and organized under authority of the laws of New York. This company, upon its organization, entered actively upon business, and prosecuted the same with unusual energy and success. It extended its operations over many of the most prominent railroads and water lines, and earned, as it justly merited, the confidence of its patrons and the general public. At the commencement of the rebellion it was doing an extensive and profitable business in the southern States. But the exigencies of war forced a suspension of its business within the insurrectionary territory, of which exigency the complainant, the Southern Express Company, was born. The complainant is a corporation organized under and pursuant to a charter granted by the

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State of Georgia, and by purchase succeeded to the property, business and good will of the Adams Express Company in the southern States. But the two companies, notwithstanding their separate existence, sustained close business relations, and agreed to the interchange of freights on terms beneficial to themselves and their customers. By this friendly co-operation and judicious interchange of business, they so far preserved their unity as to secure to their patrons all the conveniences that could have been offered by one company doing the business within the territory occupied by them both. Among other business of the Adams Express Company to which complainant succeeded, was the business which the former company was then doing over the several railroads, so far as they were then in existence, which now constitute the property of the Nashville, Chattanooga & St. Louis Railway Company, which complainant has continued from its organization till the present time. But it did said business under special contracts. These contracts contained stipulations reserving to the respective parties the right, upon giving the notice prescribed therein, to terminate the same.

Recently, many changes in the ownership, and consequently in the management of railroads in Kentucky, Tennessee, and contiguous States have taken place, whereby the Louisville & Nashville Railroad Company's power has been greatly augmented. The managers of this company, by leases and otherwise, have acquired the control, it is said, of about four thousand miles of railroad. The bill alleges that they have recently organized the Union Express Company to transact the express business over the several railroad lines controlled by it. And that with the view of supplanting the complainant and substituting the Union Express Company as express carriers on said roads, they caused notices to be given complainant terminating the contracts under and in

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virtue of which complainant has been carrying over said roads. This charge, however, is denied. But if such was defendant's purpose, on being better advised, the programme has been abandoned, and defendant now concludes that it cannot legally thus discriminate between express carriers; that if it carries for any, it is legally bound to carry for every one offering to do the same sort of business on the same terms.

But defendant is, it seems, determined to exclude complainant from the use of its road, and now proposes, as the only alternative left for the effectuation of its determination, to exclude all express carriers, and do the express business over its road itself. And hence the question is squarely presented, Can defendant legally refuse to carry for complainant and extend to its messengers and agents all the facilities hitherto extended to it, and undertake and do the express business over its road itself? This is the question which the facts present.

In order to a correct solution thereof, let us contemplate briefly the objects for which railroads were created, and the obligations and duties imposed on them by law.

Railroads are *quasi* public institutions; they are authorized to facilitate and not to control or force from legitimate and natural channels or hinder or obstruct the business of the country. Hence the companies organized to construct them were invested with the right of eminent domain—with the authority to condemn private property necessary to the full enjoyment of their franchises, on paying just compensation therefor. The authority to do this could only be conferred upon the theory that the public interests, which they are supposed to represent, require such seizure and appropriation. Under our government, private property can not be taken for any other than public uses; vested rights can be made to yield only to the public necessities; railroads are held to be

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such necessities, and it is solely on this ground that their construction has been encouraged by liberal grants of power, and aided by private and public contributions.

As *quasi* public instrumentalities, organized to promote the public good, they are, unless plainly and constitutionally exempted from such liability, amenable to such just regulations as the legislative department may choose from time to time to prescribe. All laws deemed necessary to insure good faith in the exercise of their franchises, or to enforce an honest, impartial, and efficient discharge of their legal duties and obligations, may be enacted; and, if the right has not been contracted away, the legislature may prescribe their schedule of charges, compel every necessary facility to the public and to individuals to the extent of their means, enact police regulations, limit the speed of trains, command the use of signals, and order or inhibit the doing of any and everything expedient to advance the general interest of commerce and intercommunication, insure safety to travelers, and generally to subserve the purposes of their creation, restricted only by the constitutional limitation that vested rights are not impaired without just compensation. They are as amenable to the unwritten (as it has been judicially expounded) as to the statute law. The first and perhaps the most important of these principles, settled by judicial decisions, is that railroad companies, as common carriers, are bound to the extent of their corporate means to supply all the accommodations and facilities demanded by the regular and ordinary business of the country through which they pass. Railroad carriage has in a large measure superseded every other means of inland transportation. Everybody, whether they will or not, is forced to patronize them. And as they were created to subserve the public good, and undertook to carry persons and property, they are, if able, bound to supply every facility needed for that purpose. They must keep pace with improve-

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ments in machinery, furnish easy access to and egress from their trunks, stop at convenient points for the admission and exit of passengers, make adequate provision and tender suitable cars to carry on the business offered, and generally to carry passengers and freight, and from time to time adapt their rolling stock and equipment to the varying necessities of advancing civilization and approved methods of doing business. And next in importance to this leading idea is the obligation to do exact and even-handed justice to everybody offering to do business with them. If derelict in the performance of any one of the obligations imposed by law, they may be quickened thereto by the mandatory power of the courts, or compelled to surrender their franchises, which they thus refuse or neglect to exercise in the spirit of their several charters.

But defendants deny that any one or all of the foregoing familiar principles reach and control the question in this case. Its position, as we understand it, is that, notwithstanding it is a *quasi* public instrumentality, it is also private property belonging to defendant, and that it is ready, able, and willing and now offers, to render to the public every service which the public has a right to demand, including the carriage of express matter, over its road, and protests that complainant has no legal right to use its road against its wishes and in the manner claimed, and, by a forced use thereof, enter into competition with it in the carriage and delivery of express freight.

At first blush this position seems to be well taken, but, on further consideration, is found to be more plausible than substantial. As a common carrier the defendant is as much bound to carry for another common carrier as it is to carry for other persons. The proposition, as it is stated, will not be controverted. Defendant cannot and does not deny its obligation to carry for the complainant. Its claim is that it is

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only bound to carry for the complainant when complainant, like other forwarders, delivers its freight into its care and custody, to be handled, transported, and delivered by it through its own agents and servants; that complainant has no legal right to demand and enforce the use of defendant's passenger trains for the purpose of carrying freight in the special keeping of its own employes, to be by them handled *in transitu*, and delivered at way stations and other places of consignment, and to have provided therefor special accommodations, such as have been heretofore supplied to it under special contract. It is upon this point the contest is to turn.

The issue is not, therefore, whether the defendant is bound to carry for the complainant, but can it be compelled to carry in the manner and with the divided responsibility proposed? Herein lies the novelty and importance of the question.

No such question could have well arisen a half a century ago, because the methods of doing business and the facilities then provided for inland transportation were not such as to raise it; but we have made wonderful progress since that time in physical as well as mental development, and no instrumentality subject to man's service has been more potential in bringing about the change than railroads. They are as potential in peace as in war. We now have about 90,000 miles of railway in the United States, which cost more than \$3,000,000,000, employing not less than 400,000 persons, and yielding more than \$500,000,000 of annual gross earnings.

Their rapid transit has made luxuries, which, but for the facilities afforded by them, would be unknown in the interior land-locked localities of this great country, possible to the most remote sections. Tropical fruits, fish from the oceans and lakes, and oysters from the bays, are now, through the co-operative energies of the railroads and express carriers, within the reach of almost every community. These facilities

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making possible and suggesting corresponding changes in the methods of business, and gradually, but certainly, working changes in the habits and tastes of the masses of our people, have opened up the way for and called express transportation into use. The duties and office of railroads and express carriers are widely different and totally distinct. The former was created to furnish motive power and to receive, carry, and deliver such freights as are appropriate to such a mode of transportation. But the legislatures, granting railroad charters, with perhaps few exceptions, never contemplated nor expected them to carry money, gold or silver bullion, bonds, bank-notes, deeds, and other valuable papers, jewels, and other small articles of great value, fruits, fresh meats, fish, oysters, or other like commodities liable to rapid decay, or live animals requiring special care and attention during their transportation; nor are railroad companies authorized by their charters to receive notes, drafts, or other choses in action for collection and return of proceeds, nor to receive and forward freight, with the bills and charges of the forwarder attached, to be collected from the assignee on delivery and returned to the shipper, and in connection with such business to afford to the public, under a single contract, and on assured responsibility, safe, reliable, and speedy transportation from and to all points accessible by the use of two or more railroads; nor are railroads, under their charters, required to render such services. Much of the services rendered by express carriers, and appropriate to their peculiar functions, is not such as is by law imposed on railroads. If express carriers were ejected from the railroads, the latter could not be compelled to supply their places, and consequently the country would be without such facilities, unless the railroads companies would exceed their corporate obligations, and voluntarily undertake to do what they are not legally required to do, and to do many things which under their charters they have no right to

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do. As they are under no legal obligations to render such accommodations to the public, and could not be compelled to render them, they could, after ejecting the express carriers, monopolize the business, dictate oppressive rates, while affording less safety, celerity, and convenience to customers, as a substitute for the expeditious, reliable, and necessary services of expressmen. The country would be dependent upon an illegal assumption of authority by railroads, an assumption in some respects in contravention of public policy, because it would enlarge their power and influence for controlling the business of the country, which, to say the least, is already sufficiently formidable.

But it is enough to say that railroads were not created to do an express business, are not suited to such service, possess no legal capacity to engage in it, cannot be required to undertake and perform it, and, I may add, ought not to be permitted to engage in these branches of the express business, *ultra vires* their corporate powers if they would; and, as they are not legally bound to render express facilities to the country themselves, can they, by excluding the expressmen, deprive the public altogether of this necessary facility? Or else extort such concessions as the petty resentment or cupidity of their managers might prompt them to exact? We think not.

On the contrary, if the express business, as we have hereinbefore asserted, has become a convenience to the general public, we think it the duty of all railroad companies, through their managers, and in the exercise of the trusts confided to them for the public good, to make proper provision for everybody wishing to carry express matter over their respective roads, as, in doing so, they would be accommodating the public, and fulfilling, to that extent, the objects and purposes of their creation.

The express business, which had its inception as herein

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previously stated, now extends all over the States; is carried on by numerous organizations, which meet the requirements of the several localities in which they do business; and occupies every railroad line in the country available for the purpose. They have an invested capital of over \$30,000,000, and the Adams and Southern Express Companies have in daily use and occupation 21,216 miles of railroad; employ 4,297 persons; make 911 daily trips, over 64,560 miles, aggregating 19,884,420 miles of travel annually. And for the transportation of their freights they pay the railroad companies over \$2,000,000 per year. It is further alleged, as showing the extent and magnitude of the express business, that these companies carried for the government \$1,200,000,000 in 1878, and \$661,000,000 in 1879, and for private parties in the last-named year, the enormous sum of \$1,050,000,000; and that the Adams Express Company alone receives and disburses, in New York City, 14,000 packages daily, employing therefor, in connection with their general business, 918 horses, with the necessary number of wagons.

From this summary it will be seen that the express carriage of the country is only second in importance to railroad transportation, and that the express business has so interwoven itself into the present methods that it cannot be dispensed with without producing an abrupt and disastrous revulsion in the present mode of carrying on trade. It has grown into immense proportions, and has become a necessity that cannot be dispensed with. It has attained its present enlarged usefulness under the fostering care of the railroads themselves, including the defendant company. It is profitable to the railroads, and useful and convenient to the public. The right of the public to have quick, reliable, and safe carriage of goods, through expressmen, has been recognized for forty years. This general recognition by the public and by railroad corporations, in connection with its admitted utility,

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stamps it as a legitimate mode of railroad carriage. If legitimately within the scope of their charters, it is a legal duty imposed by law upon them. Endowed with extraordinary privileges, to enable them to fulfill the purposes of their being, they may be coerced to adapt their accommodations to the varying wants and necessities of general trade. They must keep abreast with advancing thought as well as with mechanical development. If they are under legal obligation to attach a Westinghouse air-brake or a Miller platform, as insuring greater safety to employes and passengers, they are likewise bound to adapt their facilities for transportation to the growing demands and conveniences of trade. Such requirements can work no injustice to them, and is no invasion of their vested rights. For such improved service they are entitled to compensation to the extent of the maximum allowed by their respective charters. No express carrier can lawfully demand the carriage of his goods without paying reasonable rates therefor. The carriage of such freights is in the strict line of railroad duty; it is a class of business that pays well, and such as the railroads have heretofore sought after. And if the custody of the freights is retained by the express carriers, the railroads will not be liable for anything more than the safe carriage of them. If they provide for the carrying and safely transport such freight, they will have done their full duty, and by doing this the railroads will realize the freight charges, and the expressmen will be enabled to fulfill their engagements and continue their business, keep up the continuity of their connections, and the public will be supplied with an indispensable facility, and no injury or injustice will be done to any one, unless it may be that railroad companies and railroad managers shall be deprived thereby of *incidental* profits and advantages to be obtained through unauthorized pursuits, and forced from the public by reason of the monopoly secured through the

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exclusion of lawful competition. We conclude, therefore, that upon the naked obligation which the law imposes on railroad companies, and without reference to the consideration to be hereafter adverted to, that the defendant is bound to render the services demanded by the complainant, and that this court, in the exercise of its judicial discretion, ought to require defendant to discharge its legal duty in this regard.

The second ground on which we think the relief prayed for may be granted, is this: complainant and the Adams Express Companies have for more than twenty years done business over the system of roads now directly and indirectly under the control of the managers of the Louisville and Nashville Railroad Company. By energy, fidelity, and the expenditure of a large amount of money, they have succeeded in building up and establishing a lucrative business over these lines, which constitute important links, securing continuity in their operations. They have trained and reliable servants, suitable chests, safes, wagons, horses and trucks, for collecting, transferring and delivering their freights, erected permanent offices and warerooms at various stations, established rapid communication and fixed and published a schedule of charges; and have a good and profitable, steady and reliable business, and an enviable and widely-advertised reputation; all of which has been accomplished, and the rights incident thereto acquired, under the friendly auspices of those who are now seeking to deprive complainant of the use of defendant's road. If defendant possessed the legal right, which we deny, to refuse the accommodations which it has heretofore extended to the complainant, it ought not to be permitted to exercise it under the facts of this case. Defendant's long acquiescence in complainant's right to have transportation of its freight; the holding itself out for so long a time as the carrier of express matter; the encourage-

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ment it has always given to this class of business, considered in connection with the investments made and the rights of the public to such service, must, in our judgment estop it from exerting its authority to exclude complainant, if it had any, at this time. A refusal to carry as heretofore for the complainant, would inevitably do it great pecuniary injury, disserve its connections, cause it to lose the good will of its customers, and depreciate its valuable property and equipments along defendant's road—perhaps one-half. Complainant ought not to be held to be so dependent on the mercy of its adversaries and interested competitors, seeking to drive it from the field in order to insure a monopoly to themselves. Defendant responds, saying that hitherto complainant has occupied its road under and in virtue of special contracts, and it contends that complainant's enjoyment of the privileges thus granted confers nothing more than was accorded by these contracts. The position, in a qualified sense, is correct, but it is as equally correct that complainant lost nothing thereby. A farmer or other person wishing to ship one or more car loads of stock or grain, or other commodity, may, with a view to convenience, specially contract for a car or cars suitable for the particular purpose, to be furnished at a specified time and place, and for such other facilities as he may need, but his doing so is no surrender of his legal rights existing independently of contracts or special agreements, to demand of a railroad company the shipment of all suitable freight tendered for the purpose. The same principle is applicable here. It was altogether proper that the complainant and defendant, in view of the magnitude of their business, should by special contract stipulate for the facilities to be furnished by the one to the other, and fix the terms and conditions upon which the business should be done, but no right arising to the complainant from public considerations, or the charter obligations of the defendant, was thereby

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waived. These contracts were in affirmance of the pre-existing legal rights of the complainant, and an admission by the defendant that the business proposed was within the scope of its duties and reasonably remunerative. It was in the reliance upon these rights conferred by law and public considerations, and thus recognized by defendant, that the complainant made the investments mentioned, and built up and established its said business, and it would be no less than a fraud upon it for the defendant to exclude it from all further use of its road, rob it of its established extensive and profitable business, and transfer it to another or appropriate the business to itself. It will not be permitted to perpetrate such injustice.

But we do not wish to be misunderstood. The fact that the complainant has pre-occupied the defendant's road confers no priority of right. The defendant, to the extent of its corporate authority, the Union Express Company, and all other persons or companies wishing to engage in the carrying of express matter over defendant's road, can enter upon that business on equal terms with the complainant. Neither the railroad companies nor the courts can discriminate in favor of one or more parties as against others. All are entitled to the same measure of accommodation who may offer to do the like business, and it is the duty of the courts to enforce, whenever applied to, this legal rule of impartial justice. We have no disposition to discourage or hinder any one from entering into competition with complainant. The more of them the better it will be for the railroads, as well as for the public. The railroads will thereby have more business, and the public will be better protected against exorbitant prices and the exactions of aggregated wealth and business combinations. Equal protection to all will do this. It can, however, never be attained by taking the fruit of one man's labor and giving it to another. Antagonisms between

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railroads and the public exist more or less in every locality, and is too often manifested in the verdicts of jurors, unjust legislation, and various other ways. This is to be regretted, but the surest way of counteracting these popular resentments is to require the railroad companies and their managers to keep within their legitimate spheres, and compel them, in good faith, to administer the trusts confided to them for the public good. This court is as ready to protect railroad companies in the full enjoyment of their franchises, and against the injustice mentioned above, as it is solicitous to compel them to do their full duty to the public.

Judge TREAT, of Missouri, Judge GRESHAM, of Indiana, and Judge WOODS, of the fifth circuit, indicated the bent of their minds by granting restraining orders similar to the order issued in this case. I have consulted two of the district judges of this circuit who concur in the conclusion herein announced. Justice HARLAN, as I understand his recent decree, decided the same question, in the same way, and the associate justice assigned to the circuit, on being requested, a few days since, to sit with me on the hearing of this motion, said that he had great confidence in the learning and accurate discrimination of Justice HARLAN, and that he had no idea that he would, after investigation of the question, dissent from the decision made by the former. These intimations and concurrent views, coming from so many and such high sources, have very materially strengthened the convictions which I have myself entertained in relation to the questions involved. I shall follow the ruling of Justice HARLAN, and continue the restraining order until a final hearing can be had.

The same decree will be entered in the case of *Adams Express Co. v. The Louisville, Cincinnati & Lexington R'y Co.*

The following order was entered:

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W. B. DINSMORE, AS PRESIDENT OF ADAMS EXPRESS COMPANY,
v. LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY.

The motion of the complainant for a preliminary injunction herein, according to the prayer of the original and supplemental bill herein, having been brought on to be heard, and counsel for the respective parties having appeared and been heard, and the court having duly considered the questions involved, does hereby order that a preliminary injunction issue herein restraining the said defendant, its agents, officers and servants, during the pendency of this suit, from interfering with or disturbing in any manner the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon its lines of railway, for the transaction of the business of the said Adams Express Company, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the Adams Express Company, and from excluding or ejecting any of its express matter, or messengers, or employes from the depot, cars and lines of said defendant, as the same have been heretofore and are now enjoyed and occupied by the said Adams Express Company, and from refusing to receive and transport in like manner as the said defendant is now doing, over its lines of railway, express matter and messengers of the said Adams Express Company; and from interfering with or disturbing the business of the said Adams Express Company in any way or manner whatsoever; and from refusing to permit the Adams Express Company to continue the transaction of its said business over the lines of the defendant, on the same terms, conditions, privileges, facilities and accommodations as are or may be permitted or accorded to any other express company, or to or by the defendant itself, in the conduct of an express business over its railway lines, upon the payment by the said Adams Express Company of all lawful and reasona-

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ble charges which may be properly demanded by the said defendant, or paid by such other express company, or by the public, to the defendant therefor, not in excess of the rates authorized by its charter, and not in excess of the rates charged to others for similar services, and not in excess of the rates charged and received by the defendant from shippers of express matter, to be carried by the defendant, as such. In the last case, less the reasonable costs of the accessorial service rendered off the railway lines and at the stations and on the trains of the said defendant, and with liberty to the parties to make such further application herein to the court as they may be advised is necessary to fix what is and shall be a lawful or reasonable compensation, or for any other matter growing out of the case. In the event of a dispute between the parties pending a preparation of this cause, as to what is reasonable compensation for the services performed by the defendant company for complainant, and what is a reasonable rebate to be allowed by the defendant for said accessorial service, such difference shall be referred to the court, after due notice; and pending such reference the complainant shall not be disturbed by the defendant in the transaction of express business over its line.

The decision which follows approves the ruling of Judge BAXTER. A like opinion was rendered at Keokuk, Iowa, by Judges MILLER and McCrARY, March, 1882. [*Reporter*.

THE SOUTHERN EXPRESS COMPANY v. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

THE SOUTHERN EXPRESS COMPANY v. THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY.

FEBRUARY 21, 1882.

MILLER, J.—In these cases, argued before me at St. Louis, with Judges McCrARY and TREAT, I can do no more than present certain general conclusions at which my mind has arrived, in regard to the propositions argued by counsel.

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1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

That while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried, and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent, or messenger, of the person or company engaged in it; and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

4. That under these circumstances there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners, or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyance, by special cars or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter, and the person in charge of it, should be carried by the railroad company at fair and reasonable rates of compensa-

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tion; and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

7. I am of opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already intimated, and to make such orders and decrees, and to enforce them by the ordinary methods in use, necessary to that end.

8. While I doubt the right of the court to fix, in advance, the precise rates which the express companies shall pay, and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered to ascertain the reasonable compensation and compel its payment.

9. To permit the railroad company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance, or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty, I think that the court can assume that the rates or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to keep and present an account of the business to the court at stated intervals, and claim an addition to, or rebate from, the amount so fixed.

And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. When no such arrangement has heretofore been in existence, it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, etc.

12. I am of the opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies

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BEHR v. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE—
JUNE 7, 1880.

1. **RULE AS TO NEW TRIAL—FAILURE TO INSTRUCT.**—The court may comment on the facts in charging a jury when done to aid it in reaching a just conclusion, but ought not to assume to decide the matter of fact itself. Where, therefore, an instruction is asked looking to an explanation of the meaning of certain words or phrases, which call the attention of the jury alone to such testimony as was the strongest in favor of the party asking it without noticing in any way the proof offered by the other side, such instruction may be properly refused.

2. **SWORN STATEMENT—WHEN AN ESTOPPEL—SWORN ADMISSION.**—The distinguishing feature of an estoppel is that under no circumstances can it be averred against; it is not susceptible of explanation and often speaks against the truth. A sworn admission may become an estoppel; as it may, whether sworn to or not if parties act on it, or would be prejudiced by it, and perhaps, in some cases where no explanation can be given, and the party is caught in deliberately attempting to cross himself by swearing two contrary ways about the same fact, it may, in one sense, be called an estoppel to hold him to his first oath and not permit him to gainsay it.

3. **SAME—SAME.**—But if made inconsiderately or by mistake, the party ought certainly to be relieved from the consequences of his error. It would make a most odious estoppel to forever hold a party to a falsehood, whether any one has been injured by it or not.

4. **SAME.**—A party is bound by his oath, unless he can satisfactorily show that he did not in the first instance willfully make a false oath. *Seem*, that a man is never bound by a false oath so that he cannot show the truth as between himself and others who are strangers, and have been neither injured nor prejudiced by the original falsehood.

5. **WHEN OATH IS ACTED UPON.**—The rule is that where an adverse party has acted upon or been prejudiced by an oath, though innocently made, the deponent cannot afterwards contradict it. He is estopped. But he is not precluded from contradicting it, unless other parties have acted upon it or he has taken the oath without mistake or inadvertence on his part. And in Tennessee, if he willfully swear falsely he is estopped under all circumstances. If he has so sworn he cannot contradict it or offer proof of others to contradict it.

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This was a motion for a new trial to set aside a verdict of \$2,881.

The facts were these:

Mrs. Behr, the plaintiff, filed several years ago a petition for divorce from her husband, whose life was at that time assured by the defendant company. In that she stated upon oath that her husband was habitually drunk for four years, and for the last two years prior to filing such petition subject to *mania à potu*. She now sued to recover on the policy, the husband being dead, which death the defendant insisted was a suicide produced by drowning. Defendant further insisted that the policy was void because of false representations by the assured as to his health and habits at the time of procuring the policy, and introduced in proof thereof this sworn statement of Mrs. Behr. Proof was taken on this point by both sides. The attorney who drew the petition for divorce, stated that the language used was his, but that he read it over to Mrs. Behr before she swore to its truthfulness. He further stated, as a fact, that in 1869, when the policy was procured, the deceased husband was a temperate man. Mrs. Behr, being called as a witness in her own behalf, swore that she was a foreigner, having been born in France, and that her knowledge of the English language was limited. Further, that at the time of applying for the divorce she was suffering from great mental anxiety, and that the course of her husband towards her and her children rendered them miserable, and brought want and suffering. She stated further that it was a mistake made by her in telling her lawyer that her husband had been so long a drunkard, and that she swore to the petition, without knowing the effect or force of the words employed, or without discovering the mistake.

The attorney, it may be added, made additional testimony to the effect that the deceased husband was a relative of his, and that he and other friends had urged the

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plaintiff to apply for a divorce. He stated further that, having seen the husband when raving, he concluded that he was suffering from *mania à potu*, which word he had himself used in the petition; and with this exception was by plaintiff told that the facts were as stated in the petition.

Motion for new trial.

The facts are sufficiently stated in that part of the charge to the jury referred to, and in the opinion.

On the trial, the court charged the jury, among other things, as follows: "If you believe the facts stated in the petition for divorce to be true, it is an end of this case, and the plaintiff cannot recover. It proves, if true, conclusively, that the life assured was addicted to habits of intemperance at the time the policy was issued, and that he subsequently had *delirium tremens*. But if you find there is evidence tending to show that the facts stated in that petition are not true, or only partially true, the question then arises, what force and effect shall you give to the petition? It is contended by the defendant company that Mrs. Behr, the plaintiff here, cannot gainsay it; that she is estopped to deny it, whether true or false. There is, undoubtedly, a principle of law which holds one to his oath, whether it be true or false, very rigidly under certain circumstances. If one swear falsely to a state of facts, and you act on it, so that if he be allowed to deny it you are prejudiced, it is an estoppel, and he will not, under any circumstances, be allowed to deny it, no matter how innocent he be. But there is no evidence in this case that the defendant company has in any way been prejudiced by this oath of Mrs. Behr to the petition. The company has not acted on it, nor suffered by it, and I do not think the rule of estoppel applies to it for that reason.

"But there is a further principle of law to be considered, which may apply, and it is for you to determine how the fact

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is in this case. It is a rule of public policy that if one willfully and deliberately swears falsely, whether anybody acts on it or not, or is prejudiced or not, he cannot be heard in a court of justice to swear to the contrary when his interest demands that he shall change his oath. But if he has inadvertently or mistakenly sworn to a state of facts which he now says is not true, and he proves to your satisfaction that he is innocent of the offense of intentional false swearing, you may look to the proof at large and say how the facts really are. If, therefore, you find from the facts in this case that Mrs. Behr has explained satisfactorily to you how she came to make an oath which she now says is not true, and you are of opinion that she is innocent of making a willfully and deliberately false oath to obtain a divorce, then, and only then, will you be allowed to look at the other proof in the case. That is the first question for you to determine. If you find it against her she cannot recover."

"But, assuming that you have determined that question in her favor, then you may look to all the proof, including her admissions in that petition, and say how the truth is. Admissions under oath, made with a knowledge of the facts, are the very highest order of testimony and deserve great weight at your hands. You are to look to the admissions in the light of the surrounding circumstances; to her condition mentally; to the nature and character of her means of information; to the fact that the document is a legal proceeding, drawn by a lawyer and read over to her by him; to the extent of her understanding of the language used; to the object and character of the petition itself, and to every fact and circumstance found in the proof adding strength to or detracting from the sworn statement, and say what weight you will give to it under all the circumstances. Having thus weighed the admission, you will in the same way look to the other proof in the case, weigh it in the same manner, and say whether

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the facts be as the plaintiff now claims them to be, or as the defendant says they are. If you find that Behr, the deceased, was, at the time he took out the policy, addicted to the use of ardent spirits, the plaintiff cannot recover; or, if you find that he subsequently acquired the habit of intemperance, so as to impair his health or produce *delirium tremens*, she cannot recover."

The court refused to give the following charge asked by the defendant company, viz.:

"Ordinarily, a party having made a sworn statement of facts in the course of a judicial proceeding, (as, for instance, such a statement as is made in the petition for divorce filed by Mrs. Behr, and given in evidence in this case,) is absolutely bound by such statement, and estopped from showing that such statement was not true. This doctrine has its foundation in the obligation under which every person is placed to speak and act according to the truth, and in the policy of the law to suppress the mischiefs that would arise if men were permitted to deny that which, by their solemn and deliberate acts, they have declared to be true. The conclusive effect of such statements can only be obviated by clear proof that they were made inconsiderately or by mistake.

"If the statements were made *deliberately*, as if the facts were communicated to counsel with a view to be incorporated in a petition for a divorce, and the petition, after being prepared, was read over to the party by her counsel, and then adopted and sworn to, they cannot be said to have been made *inconsiderately*. If the facts were peculiarly within the personal knowledge of the party making the statements, and if she was not ignorant in regard to the truth or falsehood of the facts, then the sworn statements cannot be said to have been made by *mistake*. A mistake, to have the effect of removing the estoppel, must, at all events, be an *innocent*

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and *excusable* mistake—arising from imperfect knowledge or information. If the party knows the facts and misstates them, the estoppel concludes her from showing that her statement was untrue. It is not sufficient to prove that the sworn statement was untrue. There must be some satisfactory reason shown why the truth was not stated in the first instance, and the reason shown must be sufficient to establish the fact that the misstatement was innocently made, under excusable ignorance of the actual facts.”

Humes & Poston, for plaintiff.

Estes & Ellett, for defendant.

HAMMOND, J.—The errors assigned on this motion are that the idea of *estoppel* was carefully excluded from the jury; that the conclusiveness of the sworn statement was made to depend wholly upon whether or not the plaintiff had been guilty of the offense of willful and deliberate false swearing, and the court refused to explain, as asked by the instruction, what is meant by “inconsiderately” and “by mistake” making a false statement. It seems to me that so much of the instruction as sought to explain the meaning of the words “*deliberately*,” “*inadvertently*,” and “*by mistake*” is asking the court to take from the jury certain questions of fact in the case, and to determine them as a matter of law. It is certainly charging the jury upon the weight of the testimony, and expressing an opinion by the court that, under the circumstances stated in the instruction, the sworn statement was made deliberately, and not inconsiderately and by mistake. The court may comment on the facts to aid the jury in reaching a just conclusion, but should be careful, in doing so, not to assume to decide the matter of fact itself. *Furm-*

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ers' Bank v. Harris, 2 Humph. 311; *Burdell v. Denig*, 92 U. S. 716; *Life Ins. Co. v. Baker*, 94 U. S. 610.

The charge refused overlooks the proof for the plaintiff, and, calling the attention of the jury to the strong features in the defendant's favor, asks the court to say to the jury that there was deliberation in making the statement, and no inadvertence or mistake. It is not competent for the court, where there is evidence tending to prove the entire issue, although it is conflicting, to give an instruction which shall take from the jury the right of weighing the evidence and determining its force and effect. *Weightman v. Washington City*, 1 Black, 39, 49; *Greenleaf v. Birth*, 9 Pet. 292; *Crane v. Morris*, 6 Pet. 598, at p. 617; *Lucas v. Brooks*, 18 Wall. 436.

It is very difficult in some cases to determine whether an instruction is on the facts or the law of a case, and its correctness must depend on the phraseology used; but where the jury is instructed as to what their verdict shall be on the particular point, it is a direction on the effect that they shall give to the evidence. *Tracey v. Swartwout*, 10 Pet. 80.

A careful reconsideration of this charge strengthens the conviction I entertained at the time it was refused, that it is a partial statement of the facts, accompanied with an expression of opinion by the court as to the effect of those particular facts upon the general fact in dispute—namely, whether Mrs. Behr made her statement under oath deliberately, and without inadvertence or mistake. The charge was therefore properly refused.

The other errors assigned proceed upon the theory that the petition for divorce was an estoppel, and the court erred in not saying so to the jury. Undoubtedly the Supreme Court of Tennessee, in *Hamilton v. Zimmerman*, 5 Sneed, 40, 47, call the principle which concludes a party by his sworn statement, erroneously, I think, when applied to a case like this, an *estoppel*; and the subsequent cases, following the

language of that case, continue to call it so. *Cooley v. Steele*, 2 Head, 605, 608; *Tipton v. Powell*, 2 Coldw. 19, 23; *McCoy v. Pearce*, Thomp. Cas. 145, 148; *Seay v. Ferguson*, 1 Tenn. Ch. 287; *Ament v. Brennan*, Id. 431; *Nelson v. Claybrook*, (Jackson, 1880,) MSS., not yet reported.

But all these cases show that it is not an *estoppel*, because, with one accord, they say that, "if made inconsiderately or by mistake, the party ought certainly to be relieved from the consequences of his error." Now, the distinguishing feature of an *estoppel* is that under no circumstances can it be averred against; it is not susceptible of explanation and often speaks against the truth, and for this reason has been regarded as odious. It was given that name "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Bigelow, Estop. 44. Such a sworn admission may become an *estoppel*, as it may, whether sworn to or not, if parties act on it, or would be prejudiced by it; and, perhaps, in cases where no explanation can be given, and the party is caught in deliberately attempting to cross himself by swearing two contrary ways about the same fact, it may, in one sense, be called an *estoppel* to hold him to his first oath and not permit him to gainsay it. But this very case shows that it is misleading to call it so, and because it has been done we are now asked to predicate more upon the name given than is justified by the cases so much relied on, and to extend the principle settled by them far beyond what the Supreme Court ever intended.

It would make a most odious *estoppel* to forever hold a party to a falsehood, whether any one has been injured by it or not. After all, it is only a question of the force and effect of the petition for divorce as a part of the proof, and when once it is admitted that, under any circumstances, the contrary can be shown, it cannot be called an *estoppel*; and it seems to me to be giving the adverse party an unfair advan-

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tage to call it so, and likely to mislead the jury to the detriment of one who may be innocent of false swearing. In deference to these cases, which have established a rule of evidence binding on this court, as well as all others in Tennessee, I charged the jury that the plaintiff here was bound by her oath unless she could show, to the satisfaction of the jury, that she had not willfully made a false oath in the first instance. This is all that the cases cited mean, in my opinion, and all else that is claimed for them is based upon an inference drawn from the use of the word "estoppel." I have found none, and doubt if any cases elsewhere will support this doctrine that a man is ever bound by a false oath so that he cannot show the truth as between himself and others who are strangers, and have been neither injured nor prejudiced by the original falsehood.

The general rule elsewhere is not in accordance with the Tennessee cases. 1 Greenl. Ev. §§ 210-212. But in the charge I gave to the jury I have followed the cases strictly in all except calling the principle enunciated an estoppel. It is immaterial by what name it is called, perhaps, but more was sought to be implied from the word than the cases themselves justified, and it seemed to me necessary to discard it as misleading. In view of what was actually said to the jury on the subject, it seems to me that no error was committed of which the defendant can complain.

The fact that the jury were told that they could not look to the proof at large unless they acquitted the plaintiff of any intentional and willful false swearing, it is argued, called for a trial as if upon an indictment for perjury, and the jury were led to believe that they would, by finding against her, substantially fasten upon her the odium of perjury or false swearing, and were thereby led to prejudice the defendant's case by giving more effect to the plaintiff's proof than they should have done, and less to that of the defendant than they

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would have done if they had been told that they must simply determine whether she had made the oath deliberately and with full knowledge of the facts, or under circumstances showing that she made it inadvertently or by mistake.

There is much force in this objection to the charge, and it illustrates the inconvenience of applying the analogy of estoppel to the mere process of weighing testimony. The cases cited all show that there is a preliminary question to be tried, namely, whether there was an innocent mistake made. It is to be determined whether the party shall, in obedience to public policy, be precluded from contradicting his original oath. He is not to be so precluded unless he has, deliberately and with full knowledge, taken the oath without inadvertence or mistake on his part. If he has done this he cannot contradict or offer proof of others to contradict it. It is in the nature of a penalty, and a very serious one, for false swearing. It seems to me plain that it is proper to say to the jury that, in trying this question, they must find a willful and deliberate false swearing to justify them in inflicting it. Nothing less should work the serious consequence of closing the plaintiff's mouth, so that, although her husband had been, in fact, a drunkard for only a year, for example, she must stand by her false statement that he had been such for four years, and thereby lose a policy to which there is no defense if she could show the truth.

The charge given is a necessary result of the doctrine invoked, and the law of these cases, in my opinion, requires that this *conclusiveness* of the false oath shall not obtain unless the public policy against false swearing requires it. I sought to avoid the effect complained of in the charge, by telling the jury that after they had determined the preliminary question in favor of the plaintiff, they would *then* look at the admission under oath as an admission of great weight, and determine the force and effect of it in behalf of the

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defendant. The charge is very favorable to the defendant in that respect, and I think the jury understood that after they had tried the question of willful false swearing, they should give the petition for divorce the fullest weight it was entitled to, as an admission by her, going to prove the defendant's case. I have no doubt from the proof that the plaintiff did make a mistake in swearing that her husband had been a drunkard four years, and think it is fairly proved that he was a temperate man when he took out the policy. The proof is not so clear as to the extent of his subsequent habits, but the jury has found that they did not impair his health or produce *delirium tremens*, and I am satisfied with the finding, as also upon the issue of suicide.

It is plain, therefore, that in this case the plaintiff, in her petition for divorce, made statements which were not true, yet would defeat her recovery on this policy. It is not difficult to apply the rule of public policy, call it an *estoppel* if you will, to a case where the principle of protecting the courts against false swearing is called for by the facts developed; but, on the other hand, when the proof tends to show an unfortunate misstatement of the facts, it becomes a matter of serious concern to so direct the jury that they shall not hold the party to the misstatement without a clear case which calls for such punishment.

On the whole, I am satisfied with the verdict, and overrule the motion for a new trial.

The Bay City.

THE BAY CITY.

DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN—JUNE
18, 1880.

DOCKET FEES IN ADMIRALTY.

Whenever a trial is entered upon by the swearing of a jury in a common law case, or by the introduction of testimony or the opening of the argument upon a final hearing in equity or admiralty, a docket fee of \$20 is taxable.

James J. Atkinson for libellants.

Wm. A. Moore for claimants.

BROWN, J.—By Revised Statutes, § 824, there is taxable in favor of the prevailing party, “on a trial before a jury, or on a final hearing in equity or admiralty,” a docket fee of \$20. A practice has heretofore prevailed in this district of taxing this fee only upon the termination of the suit by a judgment or decree. The precise question does not seem to have arisen in any reported case. Upon reflection, however, I think the fee is taxable whenever the trial is entered upon by the swearing of a jury in a common law case, or by the introduction of testimony or the final opening of the argument upon a final hearing in equity or admiralty. The fee is not made by the statute to depend upon a judgment or decree, but is taxable on a trial or final hearing. As the labor for which the docket fee is supposed to be a compensation is performed on or before the trial, equitably the party ought not to lose the benefit of it by a discontinuance entered after the trial or

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hearing has begun. In New York the practice seems to be to allow it upon a final disposition of the cause, even without a trial or hearing. *Hayford v. Griffith*, 3 Blatch. 79.

The appeal is sustained.

KENNEDY v. THE INDIANAPOLIS, CINCINNATI
& LAFAYETTE RAILROAD CO.

CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO—
JULY, 1880.

1. PROPERTY IN HANDS OF RECEIVER—SUITS AGAINST—INJURED PARTY—HIS REMEDY.—A receiver represents the court. There can be no interference with money or property in his possession without the permission of the court appointing him. Being an officer of the court, he is entitled to its protection. He can do nothing except as he is authorized by the court, and when in possession of money or property, under the orders of the court, it is a contempt of court to disturb his possession. But an injured party is not without remedy. He may apply to the court having custody of the property or fund for appropriate relief; and upon such application he will be permitted to go before a master or sue in a court of law.

2. WHEN THE CONSTITUTIONAL RIGHT OF A TRIAL BY JURY MAY BE CLAIMED.—The constitutional guaranty securing trial by jury does not extend to chancery courts. It embraces "suits at law" only. Courts of chancery are, and always have been, invested with the prerogative of deciding facts as well as law in cases pending before them.

3. WRONGS COMPLAINED OF—TORTS.—Where the wrong complained of is a tort an action at law would be the proper remedy if there is any one capable of being sued. But a receiver is not personally liable for a tort committed by a railroad operated under his direction as receiver. And the court, whose officer he is, cannot be sued without its consent.

4. PETITIONER SEEKING RELIEF IN THIS COURT FOR A TORT COMMITTED BY A RAILROAD, OPERATED BY A RECEIVER—JURY REFUSED.—Pet.

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tioner in a case of tort committed by receiver's road is compelled to seek redress here or forego all relief. He will be required, on coming here, to pursue his remedy according to the practice prevailing in this court. The court may in its discretion call in a jury, or invoke the assistance of a master, or take such other steps for a judicial ascertainment of facts as it may regard most appropriate in the particular case. But all this rests in the judicial discretion of the court. When this court acquires jurisdiction by reason of foreclosure proceedings, it can fully administer all needful remedies. Where, therefore, petitioner, as administrator, asked for a jury to assess damages for the killing of his wife by a railroad so operated, the same was refused, properly, because not deemed necessary by the court.

D. T. Wright, for petitioner.

Hoadly, Johnson & Colston, contra.

Motion for new trial.

The facts appear in the opinion.

The defendant, a railroad corporation, issued a large number of bonds, and executed a mortgage on its road, franchise and property to secure their payment; and having failed to pay the interest as it accrued, a bill was filed in this court to foreclose the security. On complainant's application a receiver was appointed to preserve and operate the property *pendente lite*. One of his trains ran over and killed a Mrs. Cook, whose husband, after administering on her estate, sued therefor in a State court. But at the instance of the receiver he was ordered to dismiss his suit, with leave to be heard in this case. He thereupon filed his petition here, set forth his cause of action, and demanded a trial thereof by a jury.

These questions have been definitely settled by repeated adjudications. A receiver represents the court. There can be no interference with money or property in possession of a receiver without the permission of the court appointing him. Jones on Railroad Securities, p. 502-3; Story's Eq., p. 831. The power to appoint receivers is of great utility. *Ship v. Harwood*, 3 Atk. 564. A receiver is an officer of the court

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appointing him, and is entitled to its protection. He can do nothing except as he is authorized by the court. And when in possession of money or property, under the orders of the court, it is a contempt of the court to disturb his possession. No suit can be prosecuted against a receiver in any other forum without leave of the court under whose order he is acting, as the latter will not allow itself to be made a suitor in any other tribunal. Story's Eq., p. 833. Such a practice would lead to inextricable confusion, and subject the fund in the custody of one court to the judgments and decrees of other and different courts.

But an injured party is not without a remedy. He may apply to the court having the custody of the property or fund for appropriate relief. And upon such application he will be permitted to go before a master or sue in a court of law. Story's Eq., pp. 831-833.

A court appointing a receiver, although not compelled to assume jurisdiction of all controversies to which the receiver may become a party, is at liberty to leave their determination to any court of appropriate jurisdiction, but may nevertheless assert its right to take all such controversies to itself. Its power is unlimited for purposes of protection, and it may restrain the prosecution of suits against the receiver in other courts, and punish, as for contempt, any interference with its officers by force or by suit. Jones on Railroad Securities, p. 503.

The court will not permit any person to interfere either with money or property in the hands of its receiver, without leave, whether it is done by consent or submission of the receiver, or by compulsory process against him. All moneys coming into the hands of a receiver by the order of the court, are moneys belonging to the court, and the receiver is bound to distribute in obedience to the orders and directions of the court. Kerr on Receivers, 168.

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The receiver's possession being the possession of the court from which he derives his appointment, he is not subject to the process of garnishment as to the funds in his hands, or subject to his control, and such process will be regarded as a nullity. The court being in the actual custody of the property or fund will not yield its jurisdiction to another court and permit the right of property to be there tried. It will not permit itself to become a suitor in another forum concerning the property in question. If a receiver's liability to be sued in another court were recognized, it would defeat the very ends for which he was appointed. Since a judgment in another court upon the garnishment would, if recognized and sustained, divest the jurisdiction having custody of the fund. *High on Receivers*, 151.

In *Wiswall v. Sampson*, 14 Howard 65, the Supreme Court of the United States say:

"When a receiver has been appointed his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or other appropriate action, or permit him to be examined *pro interesse suo*. Now, the doctrine that a receiver is not to be disturbed extends to cases in which he has been appointed, without prejudice to the rights of persons having prior legal or equitable interests. The individuals having such prior interests must, if they desire to avail themselves of them, apply for leave to sue or to be examined *pro interesse suo*, and this, though their right to the possession, is clear."

And in the case of *Davis v. Gray*, 16 Wallace, 218, Justice SWAYNE says: "A receiver is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in *custodia legis*. He has only

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such power and authority as are given him by the court, and must not exceed the prescribed limits. The court will not allow him to be tried touching the property in his charge, nor for any malfeasance as to the parties or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt. Where property in the hands of a receiver is claimed by another, the right may be tried by proper issues at law, by reference to a master, or otherwise, as the court, in its discretion, may see fit to direct."

Such has been the uniform holding of the courts until recently, since which, modifications of the rule have been attempted by a few exceptional adjudications and by legislative enactments in some of the States. A statute of this kind exists in Ohio. But this statute cannot control the action of this court. Jones on Railroad Securities, p. 503; 7th Central Law Journal, 146; and *Thompson v. Scott*, 4 Dillon, 508. Nor can we yield to the modification of the rule adopted by some of the State Courts. These decisions have been ably reviewed by Love, Judge, in the case of *Thompson v. Scott*, and his refutation of them maintained by a cogency of reasoning that ought, we think, to forever foreclose all further discussion of the question. Mr. High, who advocates (in an article published in the Southern Law Review) the new doctrine, admits that "the weight of authority is adverse to the exercise of any right of action against a receiver, by any court other than that from which he derives his appointment, and to which he is amenable."

No other theory than that insisted on by us could be practically maintained, as the facts of this case will sufficiently demonstrate. The defendant, the owner of an important line

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of railroad, upon application duly made to this court, in the exercise of its unquestioned jurisdiction, seized the property and put it into the hands of a receiver, to be held, preserved and operated for the benefit of the parties entitled, until the rights of the parties could be judicially ascertained and declared, and a sale of the property effected. We must presume that everybody dealing with the receiver knew the character in which he was acting; that he was the representative of the court, and acting under its orders, and that if any damages were inflicted by reason of any breach of contract, or wrongful or negligent act of the receiver, or of his employés, this court was competent to award pecuniary reparation. It has the custody of the fund from which compensation is to be made, and why may the court not determine the matter by a proper issue at law, "by reference to a master, or otherwise, as the court in its discretion may see fit to direct?" This practice, besides having the sanction of the Supreme Court of the United States, affords a cheap, simple, expeditious and effective remedy. This court having the custody of the fund out of which the petitioner's demand, in case he succeeds, is to be satisfied, can order and enforce payment therefrom of any sum that may be found due him. Whereas, if the petitioner is permitted to prosecute his suit in the State Court to judgment, and recovers, that court could not, by any process recognized by law, compel satisfaction. But the petitioner would, in order to obtain satisfaction, have to bring his judgment into this court and ask for its payment, when it would become the duty of this court to look into the merits of his claim and satisfy itself of its validity before making an order to pay it. This it can do as well before as after judgment in another court. The judgment in another court, recovered on a suit prosecuted without leave against a receiver, would, as we have seen, be a nullity. It could not be enforced against the receiver per-

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sonally, nor reach and subject the funds in the custody of this court in any other way than through an order made here. Being a nullity and without legal force, why sue for and recover it? The doctrine contended for by the petitioner "contravenes," says Judge Love, "the whole scheme of equity jurisdiction in the matter of appointing receivers and in the taking of possession through them of the property in litigation." The property in the hands of a receiver is "a fund subject to the disposition of the court and under its *exclusive* control. The principle that the court which has actual possession of the fund has the exclusive right to determine all claims and liens asserted against it, is fundamental. Hence every court of equity in such a case assumes to decide all controversies touching the subject matter of the suit and the fund; to determine the existence and priority of all liens, to adjust and settle all disputed claims, marshal the assets, and finally to distribute the surplus among those who are entitled to it."

"The ground and reason of this jurisdiction is the inadequacy of legal remedies." But if petitioner's theory of the law is maintained, "if a party can without leave assert his right against a receiver in another court, and in this way withdraw controversies in regard to the trust fund from the court having the custody of it, the fund would be disposed of, not by the court having it in charge, but by another or other tribunals." And "before the court appointing the receiver could make a final disposition of the rights of the parties before it," says Judge Love, "other courts might render judgments against the receiver to an amount sufficient to absorb the whole fund or property, and the litigation would prove barren of results to the parties in the cause." If a party has the right, without leave, to sue a receiver in another court than that of his appointment, it follows that he can select his tribunal. He could, therefore, in proper cases, sue

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as well before a justice of the peace as in a court of record, and thus subordinate the court of equity to the judgments of justices of the peace. Different parties might sue in as many different courts. These different tribunals, in possession only of parts of the case, and called on to act in the absence of the parties to the original suit, would have to give judgments in ignorance of the equities of the whole case. Their judgments, under such circumstances, might and probably would be inconsistent and conflicting. One court might order one thing, and another court another contrary and different thing. An attempt to enforce these conflicting judgments would result in a conflict of judicial authority. The pendency of outside litigation, seeking to subject the trust fund in the hands of the receiver, would necessarily occasion delay. No final disposition of the original cause could be safely made until the litigation pending in other courts against the receiver was determined. The average life of a contested lawsuit in the courts of Ohio, I understand, is about five years. Before one suit could be determined another would most likely be instituted, and thus the court which first obtained jurisdiction would be ousted of its control of the trust fund, and rendered impotent to adjust the equities of the case, close the receiver's accounts and terminate the litigation.

We cannot sanction a doctrine fraught with so many inconveniences and complications.

It follows from what we have already said that the second position is as untenable as the first. The petitioner claims that a trial by jury is guaranteed to him by the Constitution. This instrument provides that "in all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The amount in controversy in this case is more than twenty dollars, and if the petitioner's case is "a suit at law," his demand for a trial

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by jury must be conceded. But it is not a suit at law. The original cause in which he intervenes is of equitable cognizance and could not have been maintained in a court of law. It is then a chancery cause pending in, and to be determined by, a chancery court. The constitutional guarantee securing trial by jury does not in terms extend to chancery courts. It has not been so understood or interpreted. On the contrary courts of chancery are, and always have been, invested with the prerogative of deciding the facts as well as the law of cases pending before them. Their right, generally, to do this has not been denied by the counsel in this case. But it is said, *arguendo*, that this case is an exception to the general rule because the wrong complained of is a tort, for which, apart from the other considerations to be hereafter adverted to, an action at law is the only remedy; and if the case was prosecuted in a law court the right to trial by jury would exist. Certainly an action at law could have been maintained for the alleged wrong if there were any one capable of being sued. But the receiver is not personally liable, and this court cannot be sued without its consent, and this consent it declines to give. There is, therefore, no one suable at law, and there is, consequently, no such suit. The petitioner is compelled to seek redress here or forego all relief. And coming here he will be required to pursue his remedy according to the practice prevailing in this court. Under this practice, as herein previously stated, the court may decide the facts as well as the law, and the right to do this extends to all questions coming legitimately before it. This right is not confined to questions arising upon the original pleading, nor to questions of equitable cognizance. When the jurisdiction has once attached, the court will grant full relief, although the questions presented are not ordinarily within the scope of chancery jurisdiction. Bispham's Principles of Eq., p. 565. And where chancery once entertains a suit upon

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grounds legitimately cognizable in that court, it will proceed to adjudicate other matters, of which it has only incidental cognizance, in order to avoid a multiplicity of suits. *Doggett v. Hart*, 5 Fla. 215; *Haggin v. Peck*, 10 B. Monroe, 210.

The principle is a familiar one. Cases exemplifying the propriety and the necessity of the rule are of frequent occurrence. An action of ejectment, unmixed with any equitable considerations, is an action at law; and if brought in a court of law, the parties, under the Constitution, have the right of trial by jury. But if there is some element of equity in the case—such as a cloud on the title—the party owning the superior title may file a bill in chancery to remove the cloud, and the court, having thus acquired jurisdiction, is authorized to inquire, by its own methods, into and pass upon the title, (a question purely legal,) remove the cloud, and proceed and administer full relief by ejecting the party wrongfully in possession and putting the adverse party therein. So the remedy to collect a promissory note is at law, and if thus sued the parties would be entitled to a trial by jury. But if it is secured either by pledge or mortgage, and a bill is filed to subject the security, a court of chancery would have jurisdiction. And being thus invested with equitable jurisdiction, it could decide any issue, legal or equitable, made in the case, ascertain the sum due, and enforce its finding by an appropriate decree. The same principle is applicable to a creditor's bill, filed to marshal assets and distribute the estate of a decedent or insolvent corporation. The debts may be evidenced by obligations on which suits at law only could be maintained. But a court of chancery obtaining jurisdiction to marshal assets, is authorized to ascertain how many debts are due, to whom owing and the amount of each, as incident to its equity jurisdiction to marshal the assets, etc. These examples are *apropos* to illustrate the case in hand. The bill to foreclose the mortgage in this case gave the court jurisdic-

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tion over the whole subject matter of the litigation, and conferred upon it authority to hear and determine *all* collateral issues that might be involved in the controversy. The court had power to appoint a receiver and to order him to operate the road; to employ operatives and fix their wages, contract for the carrying of freight and passengers; to order payments for injury done to freight; compensate shippers for damages sustained on account of non-delivery of goods, and make reparation to persons for injuries inflicted by the negligent or wrongful action of its servants; and the court could, in its discretion, in order to a just discharge of its duties, call in a jury, invoke the assistance of a master, or take such other steps for a judicial ascertainment of the facts as it might regard most appropriate in the particular case. Its right to proceed in this way has been recognized and followed for an indefinite period. It *may*, but is not *compelled*, to call a jury. Whether it will or will not send the issues to a jury is a matter resting in the judicial discretion of the court. A court could not well operate a railroad through a receiver in any other way. The remedy is cheap, speedy, effective and just. It may, however, be abused—so may any other judicial power—but the protection against abuse, in laws of this kind, is not to be found in an appeal to a jury, but in an appeal to the court of last resort. This remedy is open to the petitioner. If injustice shall be done him here, the error will be corrected by the Supreme Court. The intervention of a jury is not deemed necessary in this case, and the petitioner's motion for one will be denied.

The Supreme Court, in a recent case, have ruled almost precisely in the same terms. *Barton v. Barbour*, October T. 1878. [Reporter.

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CALVIN AMORY STEVENS, EUGENE KELLEY,
JOHN T. TERRY AND PETER GEDDES, ON BEHALF
OF HOLDERS OF INTERNAL IMPROVEMENT BONDS OF THE
STATE OF TENNESSEE ISSUED TO RAILROADS, v. THE
LOUISVILLE & NASHVILLE RAILROAD COM-
PANY; AND FIFTEEN OTHER SUITS, ON BEHALF OF BOND-
HOLDERS, AGAINST FIFTEEN OTHER RAILROAD COMPANIES.

CIRCUIT COURT—MIDDLE DISTRICT OF TENNESSEE—SEPTEMBER
25, 1880.

IN EQUITY.

1. BONDS LOANED BY STATE—LIEN.—Where a State issues bonds, transferable by delivery, and loans the same to a railroad company, without indorsement or guarantee, to be sold for money to aid or accommodate the company, which bonds are accepted upon the understanding and agreement: First, that the State is invested with a lien upon the company's railroad and property to secure "the payment by said company of said bonds with the interest thereon as the same becomes due;" second, that the interest shall be paid by the company to the financial agent of the State at least fifteen days before it shall become due, or satisfactory evidence be produced that it has been paid or provided for; and, third, that the principal of the bonds shall be paid by the company by means of a sinking fund in the State treasury, created by the purchase and deposit therein of Tennessee interest-bearing bonds—the relation of the State to the bondholder is not changed, by any of these stipulations, from that of a principal debtor to a surety.

2. SAME—SAME.—Nor does the company become debtor to the bondholder in any degree whatever. There is no express promise on its part to the bondholder, nor is any contract relation implied between him and the company.

3. SAME—SAME—SECTION 3 OF THE TENNESSEE INTERNAL IMPROVEMENT ACT OF FEBRUARY 11, 1852, CONSTRUED.—The 3d section of the act, under which the aid is given and lien declared, contains no language importing such promise to the bondholder. It declares merely that the

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State shall be invested with a lien for the payment of the bonds of the company. This lien the State imposes if its aid is accepted, and as a condition of the grant. The language may imply a promise by the company, accepting the aid, to pay the State; but there is no obligation of the company to pay the bondholder, resulting either from the positive law or from contract, express or implied.

Some of these suits were brought in the Eastern, some in the Middle, and others in the Western District of Tennessee.

The facts are clearly stated in the opinion.

Edward L. Andrews, George Hoadly, Charles O'Connor, Samuel Watson and T. S. Webb, for complainants.

C. F. Southmayd, Stanley Matthews, Edward H. East, Edmund Baxter, Wm. Baxter, W. Y. C. Humes, B. M. Estes, J. B. Heiskell, R. McP. Smith, Smith & Allison and Jas. T. & John K. Shields, for defendants.

STATEMENT OF THE FACTS.

WITHEY, J.—These are suits in equity pending in the Circuit Courts of the United States for the districts of Tennessee, brought by complainants on behalf of holders of internal improvement bonds of the State of Tennessee against various railroad companies to whom the bonds were issued, to aid in the construction of their several lines of railroads, and against all other persons interested.

They were argued together in April and May last at Nashville.

The object of the suits is to have a lien in favor of the bondholders declared and established upon the railroads of the several defendant companies, and a receiver appointed for the collection of the accrued and accruing interest; the interest having been in default since July 1, 1875. The principal is not due.

The plaintiffs' contention is, briefly, that the acts passed

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by the Legislature of the State of Tennessee in 1852, to grant aid to the railroad companies by a loan to them of the bonds of the State, imposed a lien upon the railroads, as security to the holder of the bonds and to the State—payment to the holder would operate as indemnity to the State. Inasmuch as the State and the companies are in default in the payment of the interest since July, 1875, the bondholders by these suits seek to have a lien in their favor established upon the roads.

The General Assembly of the State of Tennessee passed, February 11, 1852, an act known as the "Internal Improvement Act of the State of Tennessee," extending aid to railroad companies by a loan of State bonds, the proceeds to be used in ironing and equipping the roads. Prior to the time of passing the act, there had been issued State bonds for various purposes, of which above three and a half million dollars were outstanding. The State of Tennessee was now in good credit, her six per cent. bonds brought a premium in the money markets of the world, as did also, subsequently, her bonds issued to the defendant railroad companies under the act in question, and acts amendatory thereof, which bonds are the subject of controversy in these suits. The scheme of internal improvement now adopted was to issue to each company six per cent. bonds to the amount of eight thousand dollars a mile in installments—afterwards extended to ten thousand dollars—the first when a section of thirty miles of road was completed ready for the ties, and the subsequent installments upon completion of each additional section of twenty miles—afterwards changed to ten miles. The bonds are transferable by delivery, run not less than thirty nor more than forty years from the respective dates of issue. The interest matures semi-annually, and, with the principal, is payable in New York. They were paid to the railroad company and sold in open market without indorsement or guar-

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antee. The State was invested by the terms of the statute with a lien upon each section of the company's road as soon as the bonds of that section were issued, and upon final completion of the road such lien was to attach to the entire road and its equipments. The company was to be incapable of creating any lien conflicting with that in favor of the State.

The amount of the lien claimed by complainants in behalf of such bondholders upon all the railroads is about fifteen million dollars. The litigation however affects the holders of between thirty and thirty-five million dollars of other mortgage bonds, secured upon these roads and issued under authority of the General Assembly conferred in 1869-70 to enable the aided companies to repay to the State the bonds loaned to them. The holders of the last mentioned bonds claim to have a first lien upon the roads, and appear in these suits, with the defendant companies, to contest the lien claimed by complainants and their associate bondholders.

The interest of the State debt was in default from July, 1861 to 1866, during the civil war, when the price of her bonds had depreciated in value to less than fifty per cent. of their face. The storm of war left the railroads of the State without money, credit, or rolling stock, and their roads and bridges going to decay. The first Legislature of Tennessee, after the storm had passed, assembled in 1865, when the State and the railroad companies were alike in a condition of bankruptcy. Provision was now made by the State to fund all her over-due bonds and interest coupons outstanding into new bonds. In 1866 and 1867 the State issued additional bonds to some of these railroad companies to aid them to build bridges and repair their roads, the State reserving a lien and imposing terms and conditions like those in the act of 1852, but somewhat modified.

In 1869-70 none of the principal of the railroad aid bonds,

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issued under the acts of 1852, or acts amendatory thereof, had matured, but now the General Assembly of the State, to enable the respective companies to repay any part of the principal of their indebtedness for bonds loaned to them, passed an act permitting payment in any of the outstanding bonds of the State.

To obtain money to purchase State bonds for surrender, they were severally authorized to issue mortgage bonds upon their respective roads and equipments corresponding in denomination with the State aid bonds, and deposit them with the comptroller of the State to be by him delivered to the company or its agent whenever and as Tennessee State bonds were by the company surrendered and cancelled. These mortgage bonds were by law declared to be a first lien on the road and equipments of the company issuing them, and as evidence to the purchaser the comptroller was required to, and did, certify upon each bond that it was "secured by first mortgage."

Many of the companies availed themselves of this legislation, and under its sanction and authority an aggregate of between thirty and forty million dollars of such mortgage bonds were by the companies issued and sold, and are now outstanding.

Other railroad companies did not avail themselves of the provisions of the law of 1869-70. They continued to be in default as to the payment of interest and as to payment annually into the sinking fund required by statute. Proceedings by the State were therefore commenced in the State Court of Chancery, and decrees of foreclosure and sale obtained.

At the sale the State was purchaser. These foreclosed roads were subsequently sold by the State and new companies organized. Payment by the purchaser was made to the State in any outstanding Tennessee State bonds at their face value,

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and the purchaser was invested with all the right and title of the State.

The State, as before stated, had funded her over-due bonds and interest coupons into a new bond under the law of 1865, and in February, 1870, another act was passed to again fund unpaid interest that had accrued on the public debt, together with the floating debt of the State, and all that might become due up to 1874. Holders of Tennessee bonds, including holders of internal improvement bonds issued to railroad companies, generally accepted the provisions thus made for retiring over-due interest coupons, as they had done under the act of 1865. The State of Tennessee, however, again defaulted in her interest January 1, 1875, and subsequently openly repudiated her bonded debt, for the payment of which the faith and credit of the State were solemnly pledged.

THE STATUTE.

The internal improvement act of February 11, 1852, will alone be referred to, as it contains all the provisions necessary to be considered. The lien is declared by the third section which is as follows:

“That so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid, including the road-bed, right of way, grading, bridges, and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered, and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with the said lien or mortgage without a deed from the company, for the payment by said company of said bonds, with the interest thereon as the same becomes due.”

The requirement, by section five, as to the payment of interest is, that fifteen days before it falls due the company

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shall deposit in the bank of Tennessee—the State's fiscal agent—"an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for, and if said company fail to deposit said interest as aforesaid, or furnish the evidence as aforesaid, it shall be the duty of the comptroller to report that fact to the governor," who is immediately to put the road into the hands of a receiver to operate it in behalf of the State until the default is made good, and then to surrender the road to the company.

By this section, "the comptroller is authorized, and it is made his duty upon his warrant to draw from the treasury any sum of money necessary to meet the interest on such bonds as may not be provided for by the company, as provided for in this act, and the comptroller shall report thereof to the General Assembly from time to time."

The requirement as to the payment by the company of the principal of the bonds by section seven is: "That at the end of five years after the completion of said road, said company shall set apart one per centum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the treasury of the State, after assigning them to the governor, and for which the governor shall give said company a receipt, and as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to the company. And bonds so paid in and the interest accruing thereon, from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the company, and should said company repurchase any of the bonds issued to it under the provisions of this act, they shall be credited as aforesaid and cancelled. And should said company fail to comply with the provisions of this section, it

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shall be proceeded against, as provided in the fifth section of this act," viz., as in case of failure to meet installments of interest.

It will be noticed that as these bonds were to be issued in installments at different periods, they would therefore fall due at different times.

The sixth section provides, "that if said company shall fail or refuse to pay any of said bonds when they fall due, it shall be the duty of the governor to notify the attorney general of the district in which is situated the place of business of said company, of the fact; and thereupon, said attorney general shall forthwith file a bill against said company in the name of the State of Tennessee, in the Chancery or Circuit Court of the county in which is situated said place of business, setting forth the facts, and thereupon said court shall make all such orders and decrees in said cause as may be deemed necessary by the court to receive the payment of said bonds with the interest thereon, and to indemnify the State of Tennessee against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a receiver, ordering the sale of said road, and all the property and assets attached thereto or belonging to said company, or in such other manner as the court may deem best for the interest of the State."

By section twelve, "the State of Tennessee expressly reserves the right to enact by the Legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of this act; but in such manner as not to impair the vested rights of the stockholders of the companies."

Complainants contend that the statutory lien is to be regarded as an instrument of security taken for the benefit of the bondholders; or more fully stated, that the legislation and

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action of the State under it were effectual to fix upon the railroads respectively a lien not merely for the indemnity of the State of Tennessee, but also to secure the payment of its bonds to their holders; that the State became trustee of this lien for the benefit of the holder of the bonds, which lien inured to their benefit as *cestuis que trust* of the State, by force of the express contract to that effect in the law creating the security, as well as by necessary legal implication from the relations of the parties, which no subsequent dealings between the railroad companies and the State could discharge. Again it is said: "the first or primary object of the act was to compel each aided company to pay its debts directly to its true creditor, the lender on the bonds. This was effected by the usual and proper process, a lien pure and simple for the payment of the bonds upon the estate of each aided company enforceable in equity in case of default."

On the other hand defendants' answers state the opposing view thus: "that the said statutory mortgage was taken by the State in its own behalf and for its own benefit, and not as trustee for its bondholders, and that said statutory mortgage was conditioned solely for the payment by the company to the State of the company's indebtedness to the State for the bonds loaned to it, and in respect of both principal and interest such payment was conditioned to be made by the company to the State before the corresponding amount of interest or principal would become due or payable by the State to the holders of the State bonds; * * * that by the statute two entirely independent and distinct debts were created; one from the State to the bondholders upon its bonds payable to bearer, resting upon the faith and credit of the State; the other an indebtedness from the railroad company to the State for the amount of the State bonds loaned to it, and that the statutory mortgage was given to secure this latter direct obligation from the railroad company to the State, with which the bondholders had no connection or concern."

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It is further said that whether the engagement of the company was to pay to the State or to holders of the bonds is not important, and that if under the terms of the act it shall be held that the companies were to make payment to the bondholders, such payment was to be merely in relief of the State from the ultimate performance of its obligation—but all the while the obligation of the State remained—was to be in exoneration of the State but did not modify its undertaking on the bond and created no privity between the bondholders and the company. That such an undertaking by the company would be to indemnify the State by payment of the bond in its stead, and that the obligation was to the State alone, and one in which no one else had or was intended to have any legal or equitable interest, much less any direct participation and right of intervention or control. That the relation between the railroad company and the holder of State bonds was that merely of vendor and purchaser of negotiable securities, passing by delivery and without indorsement, and therefore created no relation between them of debtor and creditor.

OPINION PROPER.

I cannot refrain from expressing personally and officially my acknowledgements for the complete and exhaustive arguments by learned and eminent counsel which distinguished the hearing and submission of these important cases. I approach their consideration with all the aid which the most consummate and elaborate arguments can afford. The opinion will not extend over all the debated ground.

Have the holders of internal improvement bonds, loaned by the State of Tennessee to a railroad company, under the act in question, any enforceable right by contract or otherwise in the statutory lien that is reserved to the State of Tennessee for the payment of the principal and interest of the bonds as they matured? Section three provides:

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"That so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, they shall constitute a lien upon said section * * * and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien * * * for the payment by said company of said bonds, with the interest as the same becomes due."

This section of the statute relates only to the first division of thirty miles, but the lien there declared is by another part of the act applied and extended to each additional section of twenty miles as fast as completed and finally to the entire road as security "for the payment of all bonds issued to the company." (Sec. 4.)

The lien upon the property of the company was effected by virtue of the statute upon the issue of the bonds by the State and their acceptance by the company. Unless an intention of the Legislature to secure the purchaser of the bonds can be implied from the act and the dealing of the parties, the claim of complainants to the relief asked in these suits rests upon a mere equity. There is no denial that it was the State of Tennessee which was invested with the lien, but it is said that she occupies the position of a surety holding security for the payment of the debt, of which security the creditor—the bondholder—can upon default of the principal debtor—the railroad company—avail himself in equity; that default by the company and by the State in the payment of the interest having occurred, the State becomes and is a trustee of this lien for the benefit of the bondholder.—It was the State and the railroad company that dealt together in this matter. The State dictated the terms upon which it would grant aid, and the company accepted those terms without reference to what the purchaser of the bonds would say or claim. The bonds were loaned by the State and passed over to the company to be sold for money to aid or accommodate

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the company. The bonds were accepted by the company upon the understanding and agreement: 1. That the State was invested with a lien upon the company's railroad and property to secure "the payment by said company of said bonds with the interest thereon as the same becomes due;" 2. That the interest should be paid by the company to the financial agent of the State at least fifteen days before it should become due, or satisfactory evidence be produced that it had been paid or provided for; and 3. That the principal of the bonds should be paid by the company by means of a sinking fund in the State treasury, created by the purchase and deposit therein of Tennessee interest-bearing bonds, supposed to be adequate for the purpose of enabling the State to meet its bonds at maturity.

There is nothing in any of these stipulations out of which the relation of the State to the bondholder is changed from that of a principal debtor to a surety. Nor does it appear how the company becomes debtor to the bondholder in any degree whatever. There is no express promise on its part to the bondholder, nor is any contract relation implied between him and the company. Section three contains no language importing such promise. It declares merely that the State of Tennessee shall be invested with a lien for the payment of the bonds by the company. The State imposes the lien if its aid is accepted and as a condition of the grant. The language may imply a promise by the company accepting the aid to pay the State, but there is no obligation of the company to pay the bondholder, resulting either from positive law or from contract express or implied.

The lien was clearly "reserved in favor of the State." It was the State of Tennessee that, upon the issuance of the bonds, was invested with the lien or mortgage without deed. No other lien could have priority over or come in conflict with the lien of the State. The company was to deposit the

interest money and exchange with the State's fiscal agent at least fifteen days before it became due, or satisfactory evidence that the interest had been paid or provided. All the suits and proceedings under the act are given as remedies exclusively to the State. The State might have a decree and sell the road for non-payment of any bond. The bond was made by the State for the accommodation of the railroad company, and was sold in open market, without any promise by the company other than what is implied to the State by accepting the benefit of the act.

There is no express declaration of trust on the part of the State. It is sought to raise a trust out of the language of the act, and the principle is invoked, applicable to a security given by a debtor to his surety, conditioned that it shall be void if the mortgageor pays the debt on which the mortgagee is surety, viz.: That in such case the mortgage will be held both as an indemnity to the surety and as a security for the debt; the surety being regarded in equity as trustee for the benefit of the creditor, and as having no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration without notice.

The rule is not questioned. But it is not conceived that this rule would control the express terms of a mortgage or other instrument of security, nor render wholly nugatory the effect of an express reservation of a right of disposition of the mortgaged property by the mortgagee, as is provided in the statute under consideration.

It is not within the province of equity to import conditions into the mortgage. The conditions of this statutory lien were, that the company should deposit the interest money and exchange with the State's fiscal agent, or furnish evidence of prior payment, and should also pay into the treasury the means of providing a sinking fund for the ultimate payment of the bonds. This dealing was to be with the State—as to

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the payment of the principal it must have been—as to the payment of interest it was optional with the company—and there being no express covenant by the company, a compliance with the conditions named in the mortgage would discharge the lien.

We do not overlook a claim made by one of complainants' counsel, that the intention of the Legislature is to be ascertained by the language of the statute declaring the lien, but we think the statute must be construed together, and that the requirements put upon the mortgageor—the conditions of his mortgage—when read in connection with the declaration, many times repeated in the statute, that the lien is the lien of the State, should have great weight in determining the legislative intention. The meaning of the legislation is to be declared from the words and subject matter of the statute. It is the scope and meaning of the whole enactment, rather than the liberalism of words and phrases that are to govern; the signification of the entire act, and not a single clause, determines the intention of the law maker. Thus section six, considered with other provisions of the act, is important as reserving to the State the right, through proceedings in court, to sell the road, thereby discharging it from the lien imposed by the statute.

The fact that the State might discharge the lien in such way, imports that there was no intention of the law makers to give a beneficial interest in the security to any one but the State. This view applies with peculiar force where the holder of the security is a State not amenable to the ordinary process of courts.

This view of the effect of section six upon the construction as to legislative intent, is not weakened but fortified by section four—teen, which declares that “in the event any of the roads * * * shall be sold under the provisions of the act, it shall be the duty of the governor to appoint an agent for the State, who shall

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attend the sale, * * * and protect the interests of the State, and shall, if necessary to protect said interest, buy in the road * * * in the name of the State; and in case said agent shall purchase said road for the State, the governor shall appoint a receiver, who shall take possession of the road and property, and use the same as provided for in the fifth section of this act, and said receiver shall settle his accounts semi-annually with the comptroller until the next meeting of the General Assembly."

This section imports three things, at least, as to a sale: 1. A third person may be a purchaser. 2. The State may be the purchaser. 3. That the purchaser obtains a title discharged of the lien. It is manifest that if a stranger buys he takes title freed from all liens imposed by the act upon the property, and there is nothing in the language of the section or in the act to indicate that the State, becoming purchaser, does not take the property equally free from such lien.

The receiver appointed by the governor is to take possession of the road and "use the same as provided for in the fifth section," that is, in like manner, viz., "run the same and manage the entire road." This he is to do until the next meeting of the General Assembly, when by clear implication the future management or disposition of the road is left to legislative action.

The contract between the State and the company is that the State shall have a lien "for the payment by said company of said bonds," but it is nowhere required by the State, and therefore not assented to by the company, that the latter shall pay to the bondholder. It was urged that this language imports payment by the company to the only person then entitled to ask or enforce it. The language must, however, be understood to relate to other parts of the statute which prescribe specifically the manner of payment by the company,

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viz., payment annually into the State treasury of a sum to be employed as a sinking fund.

It is made optional, by section five, with the company, whether it will deposit the interest as it becomes due with the fiscal agent of the State, or pay the same to the bondholder, and by section seven the principal was to be paid by setting apart annually, after five years from the completion of the road, a certain per centum of the amount of bonds issued to the company, invested in any bonds of the State and assigned to the governor. This sinking fund provision would, within the period which the bonds had to run, place in the treasury of the State an amount sufficient to nearly or quite enable the State to pay the bonds. The Tennessee bonds were generally six per cent., and funded in those, the time required would be thirty-three years and two months.

There is nothing in the act to indicate that after the company has complied with these provisions as to interest and sinking fund, and has thus provided the State with the means of payment, that the company was also required to pay to the bondholders. Certainly this was not the condition of the security, as the only way in which a default could occur was by failure of the company to provide for payment of the interest and principal in those specified ways.

But it is said the sinking fund was not to be commenced until five years after the particular road should be completed, and that that event might not take place at all, or not till half or more of the time which the bonds had to run had expired, so that the period might be wholly inadequate in which to provide a sufficient sinking fund for paying the bonds when due, and that this indicates that the lien was not intended as a security merely for payment by the company to the State by means of a sinking fund in the manner provided. A statute must be construed from the standpoint, the circumstances and surroundings of the lawmakers when

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it was enacted; and it would be unjust, and repugnant to reason and common experience, to assume that the Legislature passed the act in the expectation that the roads would never be finished, or would not be completed within a reasonable time. Besides, section twelve reserved to the State ample powers to make such modifications in relation to the time for the sinking fund to commence, and the per cent. annually to be paid into that fund, as would fully protect the interests of the State against delay on the part of the railroad company.

Whatever might be said in regard to the evidence, adduced in these cases, of contemporaneous construction through the utterances of State officials in public documents, the action of any department of the State government, or otherwise, there is, in the judgment of the court, nothing to change the views which have been expressed.

Chamberlain v. St. Paul & Sioux City R. R. Co., 92 U. S. 299, was decided upon a statute and upon facts similar to those in the present cases, and is very instructive. The State of Minnesota by a constitutional amendment provided for an issue of its bonds as a loan to the Southern Minnesota Railroad Company, and required such company to convey the lands in question "in trust for the better security of the treasury of the State from loss on said bonds;" and further provided that if the borrowing company should make default in payment of either the principal or interest of the bonds issued by the State, the governor should proceed to sell the lands held in trust by the State. The company accordingly executed a trust conveyance of the lands to the State, conditioned for the payment of the principal and interest of the bonds issued to that company. The company made default in the payment of interest. The State foreclosed and became the purchaser of the lands, which she granted to another corporation, the defendant in the Chamberlain suit. Chamber-

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lain was holder of some of the State bonds, the payment of which was secured by the trust conveyance, and sought to have a lien upon the land declared in his favor.

In the cases at bar, as in that case, the State was primarily liable to the holder of the bonds. In the cases at bar, as in that case, the State reserved to itself the right of foreclosure and disposition of the property. In deciding that case, Justice FIELD, after stating the position of the complainant, viz., "that the interest which the State took under the trust deed and mortgage was only the right to hold them as security against loss upon its bonds, * * * that this interest was not changed by foreclosure of the mortgage and by purchase of the property by the State," uses the following language:

"The State was primarily liable to the bondholders; and it was only between her and the company that the relation of principal and surety existed.

"It may be doubted whether the bondholders could call upon the company in any event. The indorsement made by the president simply transferred the bonds; it was not the act of the company. Be that as it may, whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a court of chancery against the surety. But the State being the surety here, it could not be enforced at all, and, not being a specific lien upon the property, cannot be enforced against the State's grantees."

This was said to be the law of that case, even if the bondholders could have called upon the company for payment. But laying this feature aside, the analogies are as before stated,

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and whatever right the plaintiffs have to claim benefit from the security rests here, as in that case, as a mere equity; there was no legal right because the law did not impose one, and the company made no promise to the bondholder. Such equity created no lien which followed the property; the liability of the State was to the bondholder. She held no relation as surety to him; as in the Chamberlain case, it was only as between her and the company that, in any possible view, the State could be regarded as surety, and this view would make it necessary to treat the company as the principal debtor to the bondholder, whereas the company was not the principal debtor, nor indeed a debtor to the bondholder in any degree.

The reasoning in the case of *Hand v. R. R. Co.*, in the Supreme Court of South Carolina (manuscript) referred to on the argument, cannot all be adopted as applicable to these cases, if the conclusions might be.

It is not upon its facts authority. The railroad company made its own bonds, and the State guaranteed their payment to the holder by indorsement. The State was secured by a lien upon the company's road, reserved by the statute which authorized the guarantee. As a surety the State assumed contract obligations to the creditor—the bondholder. If a creditor has a right to claim the benefit of security given by the debtor to his surety for the latter's indemnity, it does not follow that the right exists where the principal debtor takes the security from the accomodatee and where the security holder holds no other relation to the creditor than that of debtor, and the giver of the security is neither a debtor nor surety to the creditor.

It becomes unnecessary to further consider the effect of the reservation of power to the State under section twelve. The court has already stated that such reserved power is ample to authorize a modification of the sinking fund provisions, as

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has been done by increasing the amount to be paid annually into the sinking fund, and changing the time for such payment to commence.

It follows that by this judgment neither the foreclosed nor the non-foreclosed roads are subject to any lien in favor of the holders of internal improvement bonds issued by the State of Tennessee, under the acts passed by that State, and to which reference has been made.

Other topics presented in the arguments need not be considered.

A decree will be entered in each case, dismissing the bill of complaint therein, with costs to defendants, and it is directed that such decrees be drawn and presented for approval.

The case of *Stevens et al. v. The Railroads* was subsequently tried before HAMMOND, J., at Memphis, involving the same facts and questions. It was submitted on brief of *E. L. Andrews* and *Hoadly, Johnson & Colston*, for complainants, and *Wright, Folkes & Wright, Peter Hamilton & Bro.* and *James Fentress*, for defendants. The case was decided in favor of the defendants. No written opinion has been filed up to this date, September 1, 1882. A supplementary brief was submitted by complainants' counsel, in which they refer, as additional authority, to the *Railroads v. Schutte* (the Florida case), 108 U. S. 78, decided subsequently to the first case. [Reporter.

Tarsney v. Turner.

TIMOTHY E. TARSNEY, ASSIGNEE, v. MARGARET
TURNER.

CIRCUIT COURT—EASTERN DISTRICT OF MICHIGAN—
OCTOBER 11, 1880.

1. FRAUD—CONVEYANCE TO MARRIED WOMAN.—When a married woman, living with her husband, consents to and permits him to receive the income of her separate estate, what is so received becomes absolutely his, and he is not answerable to her for it. The receipt of such income by him is not a sufficient consideration to support a conveyance from the husband to the wife, unless there is an agreement by him to repay or invest the same for her.

2. VALID CONSIDERATION—CONVEYANCE IN DISCHARGE.—If rents realized from her property are by her direction paid to her husband upon an understanding that he will invest the same for her benefit, he becomes her debtor legally and morally. Such obligation is enforceable in a court of conscience, and a conveyance made in discharge thereof is a valid consideration.

3. DISCREDITING ONE'S OWN WITNESS.—Where one reads the depositions of a witness on the trial of a cause, he vouches for the credibility of the one testifying. He is not absolutely concluded, as courts recognize the possibility of surprises in such matters. He may show, if he can, by other witnesses, that the facts are not as deposed to; but he will not be permitted to impeach the reputation for truth or credibility of his own witness.

4. SAME.—Nor will the court permit such party by argument, based on the assumption that such witness is interested against him and dishonest, to destroy the effect which the law requires the court to give the evidence as against the party offering it, when voluntarily adduced by such party. If believed at the time to be false, the deposition should have been withheld.

Wisner & Draper, (of Saginaw,) for complainant.

Camp & Brooks, (of East Saginaw,) and *Griffin & Dickinson*, (of Detroit,) for defendant.

The facts are fully stated in the opinion.

Tarsney v. Turner.

BAXTER, J.—In 1873, Henry Turner and wife took up their residence in East Saginaw. They were apparently in easy circumstances. He soon thereafter acquired title to property, real and personal, worth \$50,000. But by several instruments bearing date from the 13th of March to the 13th of December, 1877, inclusive, he conveyed the same to defendant, his wife, reciting an aggregate consideration of \$58,365. On the 31st of August, 1878, eight months and a half after the execution of the last of said conveyances, he filed a petition in the District Court for this district, praying to be allowed the benefit of the bankrupt law, and was accordingly in due time adjudged a bankrupt, and complainant was appointed assignee of his estate. His liabilities as proven amount to \$1,700, and his assets to \$191.50. The assets being insufficient to pay the debts, complainant filed this bill for the purpose of having said conveyances annulled, on the ground that they were executed without consideration and with the intent to hinder, delay and defraud creditors.

The defendant has answered, explicitly denying the alleged fraud, and affirming that said conveyances were executed in good faith and for the considerations therein recited.

The issue is therefore one of fact.

There is no positive evidence of an actual fraudulent intent in the execution of these conveyances or either of them. But it is insisted that there are *badges* from which the fraudulent intent ought to be inferred. A badge of fraud is any fact calculated to throw suspicion upon the particular transaction. But badges of fraud are not conclusive; they may be explained. Has such explanation been made in this case? In this regard no proof has been offered except the evidence of the defendant and her husband. *They* were called and examined by the complainant. Their examination consumed four days. They were asked a great many questions, perti-

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nent and impertinent, collateral and frivolous, but their answers, if true, clearly disprove complainant's case. They say the defendant owned a separate property in China which yielded an annual rent of \$5,000, which, by her direction, was paid to her husband; that he used this fund so paid to him to pay for the property (or a portion of it) in controversy, and took the title in his own name; that in this way he became her debtor, and that he honestly and in good faith made the conveyances assailed by this proceeding in liquidation of his said indebtedness.

The complainant, however, after thus taking and reading the depositions of these witnesses, contends that they contain discrepancies and contradictions which cannot be reconciled, from which he deduces the conclusion that their testimony is false. Is he at liberty to thus assail the integrity and truthfulness of his own witnesses? He not only took but read their depositions on the trial of the case, and thereby vouched for their credibility. But he was not absolutely concluded by their evidence. The courts recognize the possibility of surprises in such matters. One may without fault examine an unworthy and unreliable witness and afterwards discover that he has been duped and imposed on. He is, therefore, not concluded by what the witness may say. He may show by other evidence, if he can, that the facts are otherwise than deposed to by such witness, or, as in this case, where the evidence is in depositions, decline to read them on the hearing. But he will not be permitted to impeach the reputation for truth or impugn the credibility of his own witness. *Greenleaf's Ev.* pp. 442, 443; and *Philips' Ev.* vol. 2, 4th American edition, pp. 982, 983. Nor will he be permitted by argument based on the assumption that the witness is interested against him and is dishonest, to destroy the effect which the law requires the court to give to evi-

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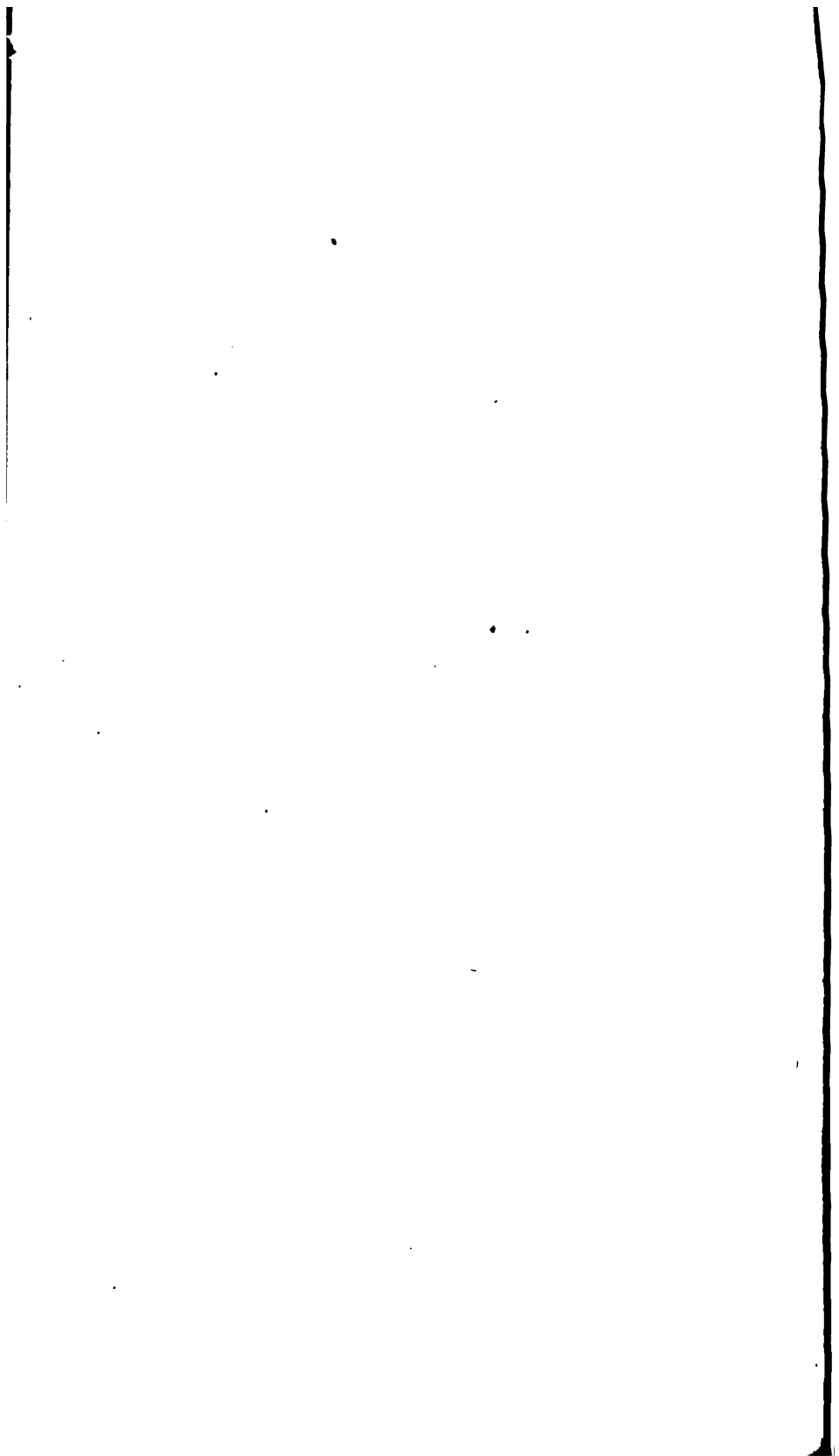
dence (as against the party offering it) voluntarily adduced by a party to a cause. If complainant believed the depositions of these witnesses, as he now contends, to be untrue, he ought not to have read them. If false, why offer them in evidence? What purpose could they subserve to be first read and then argued away as being untrue? The absurdity of such a practice is obvious. To tolerate it would but be a waste of time. Having introduced the depositions complainant is bound thereby unless there is other proof in the record showing the fact to be otherwise. There is no such proof, and it follows that complainant is not entitled to a decree on the ground that the conveyances mentioned were made to hinder and defraud creditors.

But complainant urges another ground of relief. He insists that, conceding the testimony of these witnesses to be true, he is entitled to a decree. They both admit that the rents realized from defendant's separate property, which constitutes the consideration for the conveyances attacked, were paid to the husband by the wife's direction and request; and thereupon it is contended that "when a married woman, living with her husband, consents to and permits her husband to receive the income of her separate estate," the estate thus received "becomes absolutely his, and that he is not answerable to her for it," and that the receipt of such income "is not a sufficient consideration to support a conveyance from the husband to the wife," as against his creditors, unless there is an agreement by him "to repay or invest the same for her."

We concur in the proposition as stated. But we think the evidence (if the testimony of the witnesses mentioned is to be received as true) brings this case within the exception. The rents realized from defendant's property were by her direction paid to her husband; but it was so paid upon an "understanding" that he would invest the same for her ben-

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efit. This understanding was repeatedly recognized by him. He thus became her debtor, morally and legally; his obligation to account was enforceable in a court of conscience, and the conveyances made in discharge thereof are supported by a valid consideration. Complainant's bill will be dismissed with costs.



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ABANDONMENT.—See ADMIRALTY, 40—EXECUTION, 6.

ACCRETION.—See MORTGAGES, 8.

AGENT.—See CORPORATION, 7.

ADMIRALTY.

1. In the admiralty, the court will not, on mere motion, at a subsequent term, set aside a decree made at the hearing. *The Schooner Oriental*, 6.
2. See MORTGAGE, 1.
3. See LIEN, 1.
4. The court has power to order the re-arrest of a vessel if the stipulation to answer a judgment has been accepted by mistake or fraud and the sureties were never bound. *The Favorite*, 86.
5. See SALVAGE, 1.
6. If a vessel employ a tug in general terms to tow in and land her at a particular place, the undertaking of the tug necessarily is that it will use the proper skill and ability to perform the service; and it has the right, and it becomes its duty as well, to direct the vessel that is towed, and to manage the helm, to the end that such vessel may aid in accomplishing the task entered upon, viz., making the landing. *The Southwest and L. P. Smith*, 79.
7. The master of a scow took possession of a lighter, having no authority therefor, and used her in carrying wood off the shore of Lake St. Clair to the scow, but neglected to return her: *Held*, The court of admiralty has jurisdiction, and the scow is liable *in rem* for the conversion.
Though originally seized in a fish pond staked off from the Detroit river, yet as the scow employed the lighter in its service upon navigable waters she was liable. *The Florence*, 56.
8. The provisions of Sec. 635, Revised Statutes of the United States, relative to appeals within one year from the time of entering the judgment, order or decree appealed from, does not apply to appeals from decrees in admiralty.
9. Appeals in admiralty should be taken to the term of the Circuit Court next succeeding the term of the District Court at which the decree was rendered. *The Oriental*, 87.

ADMIRALTY—Continued.

10. **COLLISION—THE VESSEL IN FAULT—NEGLIGENCE.**—The result of the authorities, English and American, is that when a collision occurs between a vessel in motion propelled by steam or sail, and a vessel or other thing at rest, the vessel in motion is *prima facie* in fault; that it can excuse itself only by showing the cause of the disaster, and that it must appear on such showing that the cause was not one of the ordinary forces of nature, but something unexpected, as a sudden storm, an unknown current or unexpected derangement of machinery, which could not have been anticipated or guarded against by the exercise of ordinary skill.
11. **BURTHEN OF PROOF.**—Neither in a civil nor criminal case does the burthen of proof ever shift. It remains on the party on whom it rested in the beginning.
12. **TRUE RULE AS TO NEGLIGENCE.**—When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.
13. **COLLISION IN DAYLIGHT—PRESUMPTION.**—When the collision occurs in broad day light the legal presumption is that the accident was occasioned by the fault of the vessel in motion.
14. **PILOT—ACCIDENT UNAVOIDABLE.**—The proof as to how the pilot turned his wheel, and that his management was proper under the circumstances, by himself and others—and that proper nautical skill was used, is a very different thing from showing that he was skillful, and in the emergency did, in his opinion, exercise his best skill and judgment. The fact that the pilot did what his best judgment dictated may prove his want of judgment, but not that the act was unavoidable.
15. **WHAT NEGLIGENCE PLAINTIFFS MUST SHOW.**—To entitle plaintiffs to recover it is not incumbent on them to show the specific act of negligence committed by defendants. It is superfluous to inquire wherein the steamboat was not managed with proper nautical skill when the collision was caused by a vessel having the power to move or stop at pleasure in a channel of sufficient breadth, without any superior force compelling her to the place of collision. It is not necessary for the plaintiff to trace specifically in what the negligence consists, and if the accident arose from some inevitable fatality, it is for the defendant to show it. *Hall & Eddy v. Little*, 153.
16. **Material men furnishing supplies in the home port where the State law gives a lien have a lien of equal rank with material men furnishing supplies in a foreign port. There is no preference of payment in their claims.**

ADMIRALTY—*Continued.*

17. The clerk of the District Court placed claims for supplies furnished in Canadian ports in a higher rank than claims of domestic material men. This was excepted to on the ground that all material men should stand on an equal footing, and the exception was sustained by the circuit judge on appeal. *The General Burnside*, 144.
18. The collision act of 1864 provides that when steamers are meeting end on or nearly end on, they shall port—each one—and go to the right, but this applies to cases in which each steamer is, at night, in such position as to see both of the colored lights of the other. Where the red light is opposite the red light of the other it does not apply, and if the green light of one of the steamers is opposite the green light of the other, or if in any case each vessel shows to the other a single colored light directly ahead, or where both lights are anywhere but ahead, the rule does not apply.
19. There is no general obligation to slacken speed, although two steamers are found approaching each other in such a way as that it is necessary to change the helm in order to avoid a collision, yet such an obligation arises in case of continuous approach or when the approaching light is found to be closing in instead of opening out.
20. If the question be whether there was promptness in giving and executing orders upon a steamer immediately before a collision, the fact that the master left the deck after the lights of the approaching vessel had been seen, and did not return until after a collision had become inevitable, may be looked to, as also the further fact that the engineer for two or three times left his post to observe the approaching lights. The court may properly consider such facts as indicating a want of due diligence. *The Manitoba*, 241.
21. The wife of a passenger brought a libel *in rem* to recover damages for the death of her husband, caused by the negligence of the officers of the vessel.
22. Plea to the jurisdiction. Jurisdiction sustained. *The Chas. Morgan*, 274.
23. See SALVAGE, 3 and 4.
24. Where a collision occurred between a propeller that was aground on the St. Clair Flats and a tow that was bound up, the propeller was condemned for not exhibiting a proper light, and the tug because it failed to stop. The schooner that was towed was adjudged faultless.
25. THE RELATION BETWEEN TUG AND TOW.—Looking to the business of towing as ordinarily conducted upon the lakes, the relation between the tug and the vessel towed is that of master and servant. The tug furnishes her own crew, regulates the length of the line and the movements of the vessels, the order in which the tow shall be made up, and determines the number of the tow, irrespective of the wishes of the master of the vessel towed. Each vessel is

ADMIRALTY—Continued.

liable to third parties for her own negligence; no further, but in certain events they may be jointly liable.

26. Where there has been no change of ownership the libellant is not debarred of his action if he commence his suit within the time prescribed by the statute of limitations; and there is no laches because two year's time has elapsed since the collision.
27. **THE CONFLICT OF EVIDENCE.**—The general rule, that where there is a conflict of evidence with regard to what has taken place upon a vessel, the testimony of her own master and crew shall be believed in preference to that of an equal number of witnesses observing her movements from another vessel, does not apply to the exhibition of a light. *The F. Moffat*, 291.(
28. **LIENS FOR NECESSARIES.**—Contracts for necessities furnished at the home port, are a lien for ninety days, under the Tennessee Code, section 1991, and it is not essential, under the statute, that credit should be given to the ship. The lien attaches to all contracts for the supplies, without reference to the fact whether the credit was given to the vessel or the owner.
29. **REMEDY TO ENFORCE LIEN.**—The remedy for the enforcement of the lien given by sections 8550 and 3562 of the Tennessee Code, whether valid or invalid, does not defeat the lien or the jurisdiction of the admiralty court to enforce it.
30. **WAIVER OF LIEN.**—The taking of notes for the debts do not waive these liens. Nor does the taking of the deed of trust to one of libellants waive them.
31. The acceptance of a trust, conditional on its acceptance by other creditors, which they fail to do, excuses the trustee, and he will not be held to have forfeited his lien. *Contra*, *BAXTER, J.*, (on appeal.)
32. **C. O. D. CLAIMS NO LIENS.**—Bills of lading, "C. O. D.," are not a lien on the boat to secure payment of the money collected from the consignee on delivery of the goods, and will be disallowed.
33. **BAR LEASES NO LIENS.**—The bar leases, or contracts for rent of the bar privileges, are not secured against breach by a lien on the boats, and where the boats were seized before the time expired, the allowance for the money paid in advance will not be preferred over other general creditors.
34. **INSURANCE PREMIUMS—LIENS.**—Premiums of insurance are a lien and will be so allowed.
35. **MORTGAGE—ITS RANK.**—A mortgage will be paid after lien claims and before general creditors.
36. **PRIORITY OF LIENS.**—Supply liens, under the statute, belong to the same class as maritime liens for supplies, and will share with them and be paid in preference to the mortgage. Insurance premiums on policies issued prior to the mortgage will be preferred to it, but

ADMIRALTY—Continued.

those on policies issued since the mortgage will be postponed till it is satisfied.

37. **REPUDIATING TRUST DEED.**—The packet company cannot repudiate their deed of trust, and general creditors may claim its benefits by petition against the remnants. *The Illinois, White and Cheek*, 383.
38. See **FEEs**, 17.
39. **COLLISION—RECOVERY—LIEN UPON INSURANCE.**—The owner of a vessel injured by a collision can only recover to the extent of the value of the offending ship and her freight immediately subsequent to the collision. He has no lien or claim upon the insurance received by the owner of such other vessel.
40. **ABANDONMENT NOT NECESSARY.**—Where actual total loss occurs, there is no need of formal abandonment to entitle the owners to the benefits of the limited liability act. *The Peshtigo*, 466.
41. A seaman cannot, by a proceeding *in rem*, join a claim for wages with a claim for an assault and battery made upon him by an officer of a vessel. *The Guiding Star*, 596.
42. If the tow, at a critical point, when about to enter an harbor, carries such sail as to take her out of the control of the towing craft, either as to her headway or course, the tug should not be held at fault for any disaster that ensues. The tow should be steered properly, and follow in the wake of the tug, and perform all those duties which nautical skill demands in order to properly manage the tow. *The Margaret*, 640.
43. The cargo, or a portion thereof, must be actually put on board a vessel, or it must be delivered to the master as master, before there can be a lien upon the vessel for breach of contract of affreightment in favor of the owner of such cargo. *The Ira Chaffee*, 650.
44. A purchaser at a judicial sale may be compelled in a court of admiralty to complete his purchase by payment of the money.
45. Should the marshal fail to make return of writ with his action thereon, it is a mere irregularity, which is healed by confirmation of the sale.
46. Though the name of the purchaser be not inserted in the order a service of such order upon him, when in default, to pay money into court, is sufficient.
47. If a proctor bid at a sale he may be personally held upon it unless it be known to the marshal for whom he is bidding.
48. The words "her boats, tackle, apparel and furniture," used in the writ and published notices of sale, imply no warranty of a complete outfit, nor even that all the property that once belonged to the vessel, is in possession of the marshal; especially as he sells her "as she lies." *The Kate Williams*, 50.

APPEAL.—See **ADMIRALTY**, 8.

ARREST.

1. See ADMIRALTY, 4
2. See HABEAS CORPUS, 5.

BANKS.

1. See INDORSER AND INDORSEE, 1.
2. See TAXATION, 1.

BONDS.

1. See LIEN, 4, 5, 6.
2. An instrument not a promissory note, not negotiable by *the law merchant*, even if placed upon that footing by a local statute, is not within the exception of Sec. 1, act March 3, 1875, authorizing suits in the United States Circuit Courts by assignees of "promissory notes negotiable by the law merchant" irrespectively of the citizenship of the assignors. *Beverly v. Davidson Co.*, 507.
3. BONDS ISSUED BY COUNTY IN AID OF A RAILROAD—JURISDICTION—PRIVITY.—Bonds issued in aid of a railroad by a County Court, authorized so to do by law, are binding obligations, and while there is no such privity between the purchasers of said bonds and the tax debtors as would authorize a suit at law, such a case comes within well-established equity jurisdiction.
4. SAME—COLLECTION OF TAXES.—If no one can be found able and willing to collect the taxes, when loaned by the County Court to pay creditors who have obtained a decree on interest coupons, on bill filed this court will entertain jurisdiction.
5. THE COURT WILL MAKE ALL SUCH ORDERS AS MAY BE NECESSARY TO ATTAIN THIS END—PRACTICE.—In such case the court will direct the payment of taxes so assessed into the registry, to be applied in satisfaction of complainants' decree; and against each defendant debtor, who shall not so pay within the time specified in the order, an execution will issue.
6. OTHER PROPERTY HOLDERS—HOW MADE PARTIES—ANCILLARY PETITION.—Should the property of parties, made defendants, be not sufficient to pay the amount due complainants, on application therefor, a receiver will be appointed, authorized to collect taxes assessed for the purpose against other property holders, not parties to this cause. And should they not pay within a reasonable time, the receiver will be instructed to bring them before the court by ancillary petition.
7. SAME—JUDGMENT AND OTHER PROCESS.—In such case a decree will be entered against them for the amount so owing and for costs, and payment will be coerced by such other further appropriate decrees and process as may seem proper and necessary. *Post v. Taylor Co.*, 518.

CHANCERY.

1. See PRACTICE, 3.
2. See TAXATION, 1.
3. See POWER, 3.

CONTEMPT.

1. See ATTACHMENT, 1.
2. Under Sec. 725 of the Rev. Stat. U. S., a juror in the Federal Court is guilty of contempt in corruptly conferring with a party to a suit during the trial, the court having expressly forbidden the jury to speak to or with any one regarding the case.
3. It seems that he would be guilty of contempt if no such direction were given.
4. The answer of the respondent as to statements of facts, in proceedings for criminal contempt, must be taken as true; but if false the government is remitted to a prosecution for perjury.
5. In such event the answer should not only be credible, but consistent with itself, and if the respondent state facts which are not consistent with his avowed purpose and intention, the court will draw its own inferences from the facts stated. *In re May*, 562.

CONTRACTS.

1. Subscriptions in aid of college endowments become fixed and legal obligations as soon as the college performs its undertaking.
2. Thus becoming valid contracts they may be proved in bankruptcy.
3. Whenever the subscriptions are settled by giving promissory notes, every presumption of law favors the validity of the transaction, and the *onus* of proof is on the one denying it, if he would impeach it. *Sturges v. Colby*, 163.
4. See ADMIRALTY, 43.

CONSTITUTIONAL LAW.

1. By act of May 4, 1869, (State of Ohio,) it is provided that "any note the consideration for which shall consist in whole or in part of the right to make, use or vend any patent invention or inventions claimed to be patented shall have the words 'given for a patent right' prominently and legibly written or printed on the face of such note or instrument above the signature thereto, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder." Such a law impairs the value of patent right property, created by the Constitution and laws of the United States, and is unconstitutional. *Woollen v. Banker*, 33.
2. The act of Congress directing the appointment of supervisors in congressional elections by the circuit judge of the United States for such congressional district as may be reported, pursuant to such statute, is constitutional, and is obligatory on the circuit judge.
3. Such action by the circuit judge is judicial, and does not fall under the head of non-judicial action or such as is ministerial.
4. The Constitution declares that Congress may, by law, vest the appointment of such inferior officers as it thinks proper in * * * the courts of law. The supervisors are inferior officers. The court is not required to perform the duties prescribed for these

CONSTITUTIONAL LAW—Continued.

commissioners, but its power is exhausted when such officers are appointed. *In re Supervisors*, 228.

CONSTRUCTION OF FEDERAL LAWS.

1. See JURISDICTION, 8, 9.
2. Section 3894 of the Revised Statutes providing that no letter or circular concerning lotteries, so-called gift concerts, etc., shall be carried in the mails, does not authorize a postmaster to refuse to deliver letters addressed to the secretary of a lottery company: (1.) Because the section does not apply to letters addressed to lottery companies or their agents by persons not connected with them. (2.) Because the section confers no power upon postmasters to seize or detain letters upon a mere suspicion that they contain unmailable matter.
3. But where it appears that letters addressed to the secretary of a lottery company actually belong to the company, and relate to its business, an injunction will be refused upon the ground that a court of equity cannot be required to aid in the promotion of schemes which are contrary to public policy. *Commerford v. Thompson*, 611.
4. See FEES, 1, 2, 5, 6, 15, 18.

CONSTRUCTION OF STATE LAWS.

1. See LIEN, 4, 5, 6.
2. See MUNICIPAL BONDS, 2, 3, 4, 5, 6.
3. **STATUTORY CONSTRUCTION—EXEMPTION FROM TAXATION.**—The charters of the earlier railroad companies incorporated by the State of Tennessee contained exemptions from taxation; but in later charters the Legislature, to save repetition, instead of enumerating all the powers and immunities intended to be granted, was content to refer to some earlier charter, and give to the new company "all the rights, powers and privileges" of the old. It is clear that the Legislature intended to confer these "rights, powers and privileges" as fully as if specifically repeated in the new charter, and such has been the recognized construction of such charters by all the departments of the State government for more than twenty years.
4. **SAME—"PRIVILEGE."**—Where one railroad company is incorporated with the "rights, powers and privileges" of a pre-existing company, the new company acquires an exemption from taxation guaranteed to the former. The word "privilege" includes in its ordinary definition an exemption or immunity from taxation. Cases cited: *State v. Betts*, 4 Zabriskie, 556; *Humphrey v. Pegues*, 16 Wall. 244; *Morgan v. Louisiana*, 98 U. S. 217, 223; *Railroad Companies v. Gaines*, 97 U. S. 711, 712.
5. **CONSTITUTIONAL LAW—EXEMPTION FROM TAXATION.**—The Legislature of a State may contract in a corporate charter for exemption

CONSTRUCTION OF STATE LAWS—Continued.

- of the corporate property from taxation, unless there be some constitutional prohibition. No such prohibition is contained in the Tennessee constitution of 1834. Cases cited: *Tomlinson v. Branch*, 15 Wall. 460; *K. & O. R. R. Co. v. Hicks*, 1 Legal Reporter, 343.
6. **STATUTORY CONSTRUCTION—WHEN FEDERAL COURTS WILL FOLLOW STATE COURTS.**—Ordinarily the Federal Courts follow the ruling of the State Courts in their interpretation of the constitutions and statutes of their respective States; but where property has been acquired and investments made under statutory contracts generally recognized and believed to be constitutional, in the absence of adjudications declaring them invalid, the Federal Courts are not concluded by the construction which the State Courts may give to such statutes subsequent to the acquisition of such property rights. Cases cited: *Olcott v. Supervisors*, 16 Wall. 678; *Pine Grove v. Talcott*, 19 Wall. 666.
7. **STATUTORY CONSTRUCTION—EXEMPTION FROM TAXATION.**—An exemption from taxation cannot be implied from the apparent spirit or general purpose of a statute. It must be certain and explicit; every well-founded doubt must be resolved in favor of the State. But this rule does not call for a strained construction adverse to the real intention of the Legislature; and to ascertain that intention the court will look to the context as well as the particular words used, taking into consideration the contemporaneous surroundings, and the purposes which the Legislature had in view.
8. **STATUTORY CONSTRUCTION—USE OF SAME WORD IN DIFFERENT CONSTITUTIONS OR STATUTES.**—The fact that the constitution of a State uses a word (*e. g.*, the word "privilege") in one sense in one clause, is no evidence that it is used in the same sense in every other clause; and were it used in but one sense throughout the constitution, it would not follow that the Legislature used it in the same sense in statutes subsequently passed. Even in the same statute a word is often used with distinctly different meanings, the courts giving to it in each instance the meaning which the Legislature intended it to have in that particular connection.
9. **CONSTITUTIONAL LAW—INJUNCTION—TAXES.**—Where a State has by valid contract exempted certain property from taxation, it cannot by subsequent legislation subject that property to taxation nor prohibit the United States Courts from using their injunctive powers to protect the contract from violation.
10. **INJUNCTION—TAXES.**—While the general rule is that courts will not enjoin the collection of taxes upon the mere ground that they are excessive or illegal; yet if their exaction is unconstitutional, and the party assessed has no other adequate remedy, or their enforcement will occasion irremediable oppression and produce a multiplicity of expensive suits, an injunction to restrain their collection will be granted. *Lou. & Nash. R. R. Co. v. Gaines*, 621.
11. See ADMIRALTY, 28, 29.

CONVEYANCES.—See FEME COVERT, 3.
CORPORATION.

1. **CORPORATIONS—JURISDICTION OF THE FEDERAL COURTS—ESTOPPEL.**—A corporation authorized by statute in Tennessee, doing business there and dealing as if organized, by reciting in its bonds and mortgages that it has been chartered by that State, is estopped when sued in the Federal Courts to deny that it was duly organized under the laws of Tennessee.
2. **FOREIGN CORPORATIONS—VOLUNTARY APPEARANCE.**—A foreign corporation by filing an answer waives the right to be sued only in the districts of the State creating it, and if the suit be in equity to enforce a lien or claim to property within the Federal district where sued, the jurisdiction is not limited to the property situated within the district, but is plenary for all proper purposes after such voluntary appearance.
3. **JURISDICTION—PLEADING.**—An averment in a bill that a defendant corporation is duly chartered under the laws of Tennessee can only be denied by a plea in abatement to the jurisdiction. A demurrer for want of equity or an answer is a voluntary appearance, although the demurrer may also seek to aver a want of jurisdiction.
4. **FOREIGN CORPORATIONS—WHEN FOUND WITHIN THE DISTRICT.**—A defendant corporation "is found" within a district where it is sued, whenever it does business there by authority of law; the law implies a condition that it shall be amenable to suit within the State, whether the effect of the legislation is to adopt the foreign corporation as one belonging to the State, or only to license it to do business within the State. An express condition that it shall consent to be suable is not necessary.
5. **CORPORATION—WHETHER STATUS HOME OR FOREIGN—JURISDICTION.**—It is always a question of legislative intent whether a foreign corporation is adopted as a home corporation or only licensed as a foreign corporation to do business within the State. When the foreign charter is duplicated, and the legislation assumes the form of creating a home corporation, and not the form of a license only, the intention is to adopt the foreign corporation as one of home construction; its effect is to consolidate the two, but for purposes of jurisdiction it is a separate corporation resident within the State of its adoption. In such a case separate organization is not necessary; the foreign organization having been adopted as one existing.
6. **JURISDICTION—COLLUSIVE SUIT.**—Where a plaintiff has otherwise a right to sue, it is no objection to the jurisdiction that he acquired the title in question for the purpose of enabling him to bring the suit. A person has the right to acquire property to enable him to sue in the Federal Courts concerning it. But if the transaction is not real, and only colorable, the title, in fact, remaining in the grantor, the jurisdiction is defeated by the statute.

CORPORATION—Continued.

7. **CORPORATIONS — CONSOLIDATION — MORTGAGE — JURISDICTION.** — Where corporations of three States are consolidated into one, a court of equity in foreclosing a consolidated mortgage upon the entire property, has jurisdiction to sell all the property in all the States. Separate suits are unnecessary.
8. **SUIT PENDING—SUBSEQUENT SUIT—JURISDICTION.**—Where by a bill to foreclose a consolidated mortgage a court in one State has acquired jurisdiction to sell property in three States wherein the consolidated company has mortgaged its property, subsequent proceedings to subject the property to other claims in one of the States cannot oust the first court of its jurisdiction to proceed. And a sale of part of the property by such subsequent proceedings cannot avoid a decree for sale in the first suit. Nor can the defendant corporation be heard to set up such subsequent proceedings as a defense to a decree of foreclosure.
9. **RAILROADS—REAL ESTATE.**—A railroad corporation, when not restricted by its charter, may acquire lands, *ad libitum*, and where it executes a mortgage to secure bonds to be used to raise money for construction purposes, may buy lands with part of the bonds to be utilized by including them in the mortgage as additional security for all the bonds.
10. **RAILROADS—SALARIES.**—The salaries of the officers of the company are a necessary part of the expenses of construction of the road, and may be paid out of the construction fund, or with the bonds to be used to raise construction funds, unless restricted by the charter. *Blackburn v. S. M. & M. R. R. Co.*, 525.
11. **SERVICE ON CORPORATION — EXTINGUISHED CORPORATION.**—Where the representative of a railroad corporation is served with process, he may plead in abatement in his own name that the corporation is extinct; or he may make the same defense by motion to dismiss the suit, or by suggestion of his attorney on record, supported by affidavits showing the facts.
12. **AGENT MAY DENY HIS RELATION TO THE CORPORATION BY THE SAME PLEA.**—Where a person is so served with process he may, by plea, deny that he sustains any such relation to the corporation as authorizes the service of process on him. *Kelley v. Mississippi Cent. R. R.*, 581.

COSTS.—See FEES, 1-20.

COURTS AND COURT RECORDS.

1. See PRACTICE, 4, 5, 6.
2. The prosecution of an action of trespass, brought in the State Court against the marshal for seizing goods of another party under execution, cannot be enjoined by the Circuit Court of the United States. It has no such power. The injunction in such case, when issued, is wholly void for want of jurisdiction. *Evans v. Pack*, 267.

COURTS AND COURT RECORDS—*Continued.*

3. See MANDAMUS, 2, 3.
4. See JURISDICTION, 8, 9.
5. An unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist. Such right exists only as allowed by statute or rule of the court. *In re McLean*, 512.
6. See CONSTRUCTION OF STATE LAWS, 6.

CRIMINAL LAW.

1. CHARGES FOR COLLECTING PENSION.—To an indictment for retaining a greater sum than the statutory allowance for collecting a widow's pension, it is a good plea that the husband of the applicant, for whose services the pension was sought was charged on the rolls of the War Department as a deserter, and that it was agreed between defendant and the applicant that he should receive one-half of the first payment on account of the pension, less costs and expenses, for his services in causing such charge to be removed. *U. S. v. Snow*, 1.
2. See HABEAS CORPUS, 1.
3. According to Sec. 819, Rev. Stat., "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty, and the United States to five peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges." The indictment was for making, uttering and passing counterfeit money: *Held*, that this was not a felony within the meaning of the above section. *U. S. v. Coppersmith*, 546.
4. See RECOGNIZANCE, 1, 2.

DAMAGES.

See ADMIRALTY, 6.

EJECTMENT.

See REMOVAL, 9.

ESTOPPEL.

1. ESTOPPEL.—The execution creditor, if the debtor in the meantime conveys to a mortgagee, has a superior title to such mortgage; and if the latter, by his own conduct, secures a letter from the judge and order from the clerk suspending proceedings, he is estopped from setting up an abandonment of the levy; nor can such subsequent mortgagee, knowing the facts, do so. *Steers v. Daniel*, (note.) 310.
2. ESTOPPEL BY RECORD.—A slave could not sue, nor be sued, while slavery existed in the slave States. Where, therefore, the judgment of a court was against one who, being kidnaped into slavery, brought suit to regain liberty, the court holding that plaintiff was a slave and not a free person as claimed, such judgment will not

ESTOPPEL—Continued.

estop plaintiff from a re-examination of the same question in a subsequent suit brought against the kidnaping party.

8. **ESTOPPEL MUST BE MUTUAL.**—Mutuality is an essential ingredient in all estoppels; slaves are not answerable civilly; are subject to no suit; no civil liability can attach to them; they can neither be bound by covenant, nor hindered by estoppel, nor will the law allow them to claim the benefit of an estoppel against others.
4. **JUDGMENT RENDERED AGAINST A SLAVE NULL AND VOID.**—A judgment rendered against a slave, where he appears in an action, is a nullity. No one can be concluded by a judgment or decree rendered in a judicial proceeding, which he had no legal capacity to prosecute or defend.
5. **HOW AND WHEN SUITS FOR FREEDOM WERE ENTERTAINED—LOSS OF JURISDICTION.**—Suits for freedom were entertained in the slave States, but upon the idea that the party suing was free. If free, he had a right to sue, but when the court reached the conclusion that he was a slave, that was the end of the litigation for the want of a competent plaintiff, and the proceeding was dismissed without further inquiry.
6. See **NEW TRIAL**, 3, 4, 5, 6.
7. See **FEME COVERT**, 3.
8. See **PRACTICE**, (last paragraph.)
9. See **RAILROADS**, 4.
10. See **CORPORATION**, 1.

EVIDENCE.

1. Libellous publications from the same paper and relating to other parties, may be put in evidence, in an action for libel, in order to prove that the paper showed a want of care in guarding its columns against the insertion of such articles. If such or similar articles were frequent it would be a ground for increasing the damages, as it would show a recklessness of conduct.
2. The words *crim. con.* and *flagrante delicto* defined.
3. The verdict for \$3,875 against a newspaper, having a large circulation, for libel in charging plaintiff with adultery, is not excessive. *Gibson v. Cin. Enquirer*, 121.
4. See **PATENTS AND INFRINGEMENTS**, 2—**INDORSER AND INDORSEE**, 3.
5. See **ADMIRALTY**, 11, 13, 14, 20, 27.
6. **JUDGMENT OF ANOTHER STATE SUED ON HERE.**—The judgments of other States are conclusive when sued on here, and this court cannot for any purpose look to the merits, even where it may have been an illegal contract. *Dawson v. Daniel*, 301.
7. Although neither an act of suicide, nor an attempt, nor a threat to commit suicide, alone creates such a presumption of insanity as would justify a jury in finding a party insane, such an act may properly be considered in connection with the previous demeanor

EVIDENCE—Continued.

and conduct of the party as an item of testimony tending to prove insanity. *Wolf v. C. M. L. I. Co.*, 355.

8. See **NEW TRIAL**, 2.

9. See **FEME COVERT**, 3—**INDORSEER AND INDORSEER**, 3.

10. See **PRACTICE**, (last two paragraphs.)

EXECUTION.

1. **EXECUTION** is not void because it issues prematurely. If issued while motion for a new trial stands adjourned, the irregularity is cured as soon as such motion is denied, and this is especially so where the order of adjournment provided that the same was granted but without prejudice to plaintiff.

2. **SEMBLE**—That the proper practice to prevent the issuance of an execution, where motion for a new trial is not disposed of, is to ask and obtain stay of execution.

3. **WATCHMAN**.—His withdrawal by levying officer no abandonment of levy. His presence not necessary to hold title.

4. **WHAT CONSTITUTES AN ABANDONMENT**.—To constitute an abandonment of a right secured, there must be a clear, unequivocal and decisive act of the party; an act done, which shows a determination in the individual not to have a benefit which is designed for him. *Dawson v. Daniel*, 305.

5. **LEVY OF EXECUTION ON LEASEHOLD AND FIXTURES—WHAT IS A GOOD LEVY IN SUCH CASE**.—In making a levy on a leasehold, even where it is taken as a chattel interest, the sheriff or marshal cannot oust the tenant in possession, or the execution debtor, without his consent, and he cannot in the nature of the thing, be required to exercise any dominion or control over it, founded on any idea of right to the possession. He should proclaim his levy to those in charge and notify the tenants of it, but even that is not necessary to sustain a levy in such case. Leaseholds are incapable of being levied on in any other manner, and it is everywhere held that where the property is incapable of manual delivery, or is ponderous and immovable, the taking into possession by the sheriff or marshal is impracticable. Such facts must be held to modify that dominion and control which the officer must ordinarily keep up.

6. **WATCHMAN—POSSESSION—ABANDONMENT**.—No watchman is necessary for the purpose of keeping title in the marshal, either of the leasehold or machinery; nor need the fixtures be separated from the leasehold property, and a failure to have the one, or do the other thing, is no abandonment of the levy.

7. **THE QUESTION, WHETHER LEASEHOLDS ARE CHATTELS OR REAL ESTATE**.—Leaseholds in Tennessee are to be levied on and sold as real estate, and judgments operate as liens on them. Purchasers are compelled to bring ejectment for the recovery of possession.

EXECUTION—Continued.

8. **LEVY BY MARSHAL ON LEASEHOLD AND MACHINERY—SUBSEQUENT LEVY BY SHERIFF OF AN ATTACHMENT—WHO HAS THE TITLE.**—After the marshal levies on leasehold and machinery, though he withdraws a watchman, put there by him to protect the property from fire, his title in the property is not affected by the levy of an attachment in the hands of the sheriff, made subsequent to the withdrawal of such watchman. *Steers v. Daniel*, (note,) 810.

9. See EXEMPTIONS, 1.

EXPRESS COMPANIES.—See RAILROADS, (last three paragraphs.) FEES.

1. **CONSTRUCTION OF REVISED STATUTE, SECTION 829.**—"Travel" or "mileage" is to be computed from the place where the process is returned to the place of service.
2. **DEFINITION OF WORD "RETURN."**—The very term "return" implies that the process is taken back to the place whence it issued.
3. **COMMISSIONER'S POWER.**—The commissioner has no power to direct the warrant to be returned before another commissioner.
4. **MARSHAL—BAILIFF.**—The marshal may appoint a bailiff and authorize him to perform a particular act or duty. He then becomes a special deputy.
5. **FEES OF MARSHAL FOR ATTENDING EXAMINATIONS, BRINGING IN, ETC.**—Section 829, Revised Statutes, allows the marshal, for attending examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crimes, two dollars a day, and for each deputy, not exceeding two, necessarily attending, two dollars a day.
6. **SAME—MARSHAL'S FEES.**—Where the marshal serves warrants on different parties at same place, he may demand mileage in each case. The only limitation is where there are more than two warrants served in favor of the same parties against the same defendants.
7. **ACTUAL TRAVELING EXPENSES.**—The expenses allowed for "traveling" must be actually proven by the marshal, deputy or bailiff who incurred the expenses, and should be referred to specifically.
8. **COSTS OF TRANSPORTING GUARDS.**—The costs of transporting a guard should be allowed only where it is shown that he is necessary, and, if practicable, the certificate of the commissioner before whom the prisoner was taken, should accompany the affidavit.
9. **COSTS OF TRANSPORTATION OF GUARDS ALLOWED, EVEN WHEN WITNESSES.**—The marshal should be allowed for transportation of guards, even if such guards be summoned as witnesses and be paid for mileage.
10. **WRONG PERSON ARRESTED.**—Where the wrong person is arrested the marshal can be allowed no fees of any kind.
11. **WRONG DESCRIPTION OF PERSON'S CHRISTIAN NAME.**—Where the Christian name of the person arrested is wrongly given by the

FEEES—Continued.

person making the affidavit and accompanying the officer who makes the arrest, transportation fees should, nevertheless, be allowed.

12. **ARREST IN THE WRONG STATE.**—Where the marshal, acting in good faith, arrests a person in Tennessee, believing at the time that the place of arrest is within the State of Kentucky, no fees can be allowed for such illegal arrest.
13. **CHARGE FOR TIME EMPLOYED IN ENDEAVORING TO ARREST.**—Where the deputy marshal demands compensation for eight days' service in, as he alleges, endeavoring to arrest through a special bailiff, and the same is not supported by proof of such last-named officer, it must be refused. The bailiff should also explain in his affidavit when charges are made for more days than are absolutely necessary, why he was so employed, and why the arrest was not made sooner. Only two days are allowed in such cases, in the absence of the regular proof.
14. **NOT TRAVELING BY USUAL ROUTE.**—Where the marshal, in transporting a prisoner, does not travel by the usual route, he should be allowed mileage only for the route usually traveled.
15. **THE STATUTES OF 1853 AND 1875 REVIEWED.**—Notwithstanding the statutes of 1853 and 1875, section 829 of Revised Statutes will be adhered to as the true rule governing the computation of mileage.
16. **DUTIES OF MARSHAL.**—As to misconduct of deputies, observed upon. *In re Crittenden*, 212.
17. Whenever a trial is entered upon by the swearing of a jury in a common law case, or by the introduction of testimony or the opening of the argument upon a final hearing in equity or admiralty, a docket fee of \$20 is taxable. *The Bay City*, 704.
18. **CLERK'S COMMISSIONS.**—The clerk of the court is allowed one per centum for receiving, keeping and paying out moneys under Rev. Stat., sec. 828. Unless the money has actually or constructively passed through his hands, he is not entitled to such commission.
19. **ASSIGNEE IN BANKRUPTCY—COMMISSIONS OF CLERK.**—There is no statute requiring an assignee in bankruptcy who has sold real estate and subsequently filed a bill in the United States Circuit Court to settle conflicting claims to the property, to pay proceeds received into the registry of the court. The clerk is entitled to no commissions in such moneys, unless an order has been made to pay the money into court. *Leach, Ass'r, v. Kay*, 590.
20. See *Leach v. Kay*, (note,) 593. (Witness fees.)

EXEMPTIONS.

1. Where the register allowed the bankrupt, who was engaged in commerce, a watch of small value: *Held*, proper, as the same was a necessary article.

EXEMPTIONS—Continued.

2. The court construes the words in the bankruptcy act, "other articles," "necessaries," and "wearing apparel," also what is meant in the books by "necessaries." *In re Steels*, 324.

FEME COVERT.

1. See FRAUD, 2.
2. See POWER, 1, 2, 3, 4.
3. FRAUD—CONVEYANCE TO MARRIED WOMAN.—When a married woman, living with her husband, consents to and permits him to receive the income of her separate estate, what is so received becomes absolutely his, and he is not answerable to her for it. The receipt of such income by him is not a sufficient consideration to support a conveyance from the husband to the wife, unless there is an agreement by him to repay or invest the same for her.
4. VALID CONSIDERATION—CONVEYANCE IN DISCHARGE.—If rents realized from her property are by her direction paid to her husband upon an understanding that he will invest the same for her benefit, he becomes her debtor legally and morally. Such obligation is enforceable in a court of conscience, and a conveyance made in discharge thereof is a valid consideration. *Tarsney v. Turner*, 735.

FIXTURES.

1. FIXTURES—BREWING ESTABLISHMENT.—Where tubs, vats and casks are too large to pass out of a building through any opening existing, these and all other such articles, must be regarded as placed there with the design of permanent use therein. They are fixtures and pass by sale with the realty to the purchaser.
2. ARTICLES ESSENTIAL, ETC.—Where articles are essential to the use for which a building is erected or designed and are specially adapted to that place but not specially adapted to any other place, they should be regarded as parts of the freehold. A building is often the mere incident for the use of machinery or utensils. The unity between machinery or other things and the building affords often a solution of the question of what passes as a fixture. *Equitable Trust Co. v. Christ et al.*, 599.

FRAUD.

1. When a firm is insolvent and there is a sale by one partner to another for a valuable consideration, this does not of itself constitute fraud.
2. Where an execution is levied after the defendant is adjudicated a bankrupt no lien attaches on the property so levied upon. *Russell v. McCord*, 139.
3. FRAUD—WHEN PLAINTIFF IS REPELLED FROM A COURT OF EQUITY.—A plaintiff will not be repelled from seeking relief in a court of equity on the maxim that he who comes into equity must come with clean hands, unless the particular transaction in regard to which he seeks relief is made up in part by fraud in him.
4. COERCION OF WIFE TO SIGN DEED—BILL TO SET ASIDE SETTLEMENT

FRAUD—Continued.

AND PURGE USURIOUS ACCOUNT.—Where the plaintiff confessed, on a bill filed to set aside a settlement and purge the transaction of usury, that he had coerced his wife to sign the deeds conveying land: *Held*, that this did not repel him from coming into a court of equity for the assertion of his rights. *Bateman v. Fargason*, 660.

5. See FEME COVERT, 3, 4.

HABEAS CORPUS.

1. A Federal officer, executing process, when actually innocent of the crime imputed, and justifiable in all that he really did, is not obliged to show, in order to procure his discharge, that he has done nothing except what he was justified in doing by process, nor to show that he was justified in doing the very thing imputed to him, and for which he is in confinement.
2. The doctrine laid down in 2 Abb. 266, modified.
3. When on *habeas corpus* the evidence does not show the shooting was done in order to enable the officer to execute the process in his hands, the Federal Court will not discharge the prisoner but turn him over to the State Court there to stand his trial. *U. S. ex rel. Weeden*, 76.
4. PERSON CHARGED WITH CRIME—DEMAND ON EXECUTIVE AUTHORITY OF ANOTHER STATE.—The Constitution provides that a person charged with crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up.
5. WHAT IS REQUIRED TO BE SHOWN UNDER THIS PROVISION.—Before the executive of a State is authorized to issue his warrant to cause to be arrested and secured a person charged in another State with crime, it should be shown by evidence, making a *prima facie* case, that such person has fled from the demanding State—and this must be done by competent evidence. The fact of fleeing lies at the foundation of the right to issue a warrant of extradition.
6. CERTIFICATE OF DEMANDING GOVERNOR.—The certificate of the governor, demanding such person upon the ground of his having fled from justice, is no evidence of the fact.
7. WHAT IS PROOF.—To prove that such a person has fled from justice so as to enable the governor to have his demand for extradition complied with, it is necessary to present with such demand a copy of an indictment, or an affidavit made before some magistrate charging the person demanded with having committed a crime, and this should be certified as authentic by the governor demanding such person. *In re S. D. Jackson*, 183.
8. ARREST OF FEDERAL OFFICER BY STATE OFFICERS.—Where a Federal officer is arrested by the State authorities, on petition alleging that he is held in custody by the latter for an act done under authority of the United States, this court has no right to refuse the

HABEAS CORPUS—*Continued.*

writ of *habeas corpus*, or to refuse to discharge him, if in the judgment of the court he merits a discharge.

9. **JURISDICTION.**—The court having jurisdiction, its decision is binding on the State Court and is beyond review, in the same manner and to the same extent as the decision of a State Court, having jurisdiction, is binding upon the Federal Court.
10. **NOTICE TO THE STATE.**—In cases of this kind, according to the practice which prevails in the District of Kentucky, notice is required to be given to those who represent the Commonwealth, but this is by no means essential; the Commonwealth not being a party. *Ex rel. Ramsey v. Jailer of Warren Co.*, 451.
11. Where a soldier in the regular service during the war of the rebellion, while acting under the orders of his superior officer, led, or was a member of, a company, which was ordered to fire upon all bushwhackers, and in consequence thereof, one such was killed, and said soldier was afterwards tried for murder, convicted, sentenced and sent to the State prison: *Held*, that the State Court had no jurisdiction to try such case, and he was entitled to his discharge, notwithstanding he was already undergoing his sentence. *Ex parte Miller Hurst*, 510.

HUSBAND AND WIFE—See **POWER**, 1.

INDICTMENT.

1. An indictment under Section 3257 of Revised Statutes of the United States does not in itself so describe the offense charged, as to give a defendant notice of the nature and cause of the accusation, while under Section 3281, to charge the violation of the law in the language of the statute is sufficient, because it describes the offense as an intent to defraud the United States of the tax on spirits distilled, by the act of engaging in and carrying on the business of a distiller.
2. **STATUTE DEFINING OFFENSE.**—If the statute itself so defines the act or acts constituting an offense as to give to the offender information of the nature and cause of the accusation, the indictment need go no further than the statute; but if it does not, of itself, do this, averments, looking to the security of the constitutional right to such information, must be added. The Constitution, in all criminal prosecutions, secures to the defendant the right of being informed of the nature and cause of the accusation. *U. S. v. Stuton*, 819.

INDORSER AND INDORSEE.

1. **NOTE PAYABLE TO CASHIER.**—A note payable to M., cashier, is a note payable to the bank.
2. M., as cashier, has authority to assign notes.
3. **PRESUMPTION AS TO OWNERSHIP.**—When the note is payable to M., cashier, the presumption is that it is the property of the bank; and if indorsed by the cashier to another bank for discount, it would be

INDORSER AND INDORSEE—Continued.

in effect asking the bank to discount it for the bank of which M. was cashier; and if discounted and the proceeds were received by the cashier it would be deemed the transaction of the bank, and within the scope of the cashier's duties and for which the bank would be liable. Nor does it matter what the defendant did with the money.

4. The president, cashier or director of a National Bank may borrow money of the bank as other persons.
5. **PAPER NOT AUTHORIZED BY COMMITTEE.**—Whether paper has or has not been authorized by the discounting committee of the bank, does not in any wise affect parties who are *bona fide* indorsees before maturity.
6. **INDORSEMENT OF ACCOMMODATION PAPER.**—A cashier has no authority to indorse accommodation paper so as to bind his bank, not passing through it in its usual line of business. The indorsement to bind the bank must be within the scope of his duties as cashier. *Blair v. First Nat. Bank of Mansfield*, 111.

INJUNCTION.

1. **INJUNCTION—CORPORATION—NOTICE.**—The members of the Board of Public Works of a city are bound by an injunction against the city, of which they have notice, notwithstanding they are not parties to the suit nor the writ, and the same is not actually served upon them.
2. **SAME—PATENT CASE.**—It is no excuse for the violation of a preliminary injunction in a patent case that the patent is invalid or the writ improvidently granted. If the court has jurisdiction to issue the writ it must be obeyed until it is dissolved.
3. **INFRINGEMENT.**—A wooden pavement patented is infringed by the use of blocks cut from trees or saplings in their natural form, though a narrow segment is cut off from one side of each block.
4. **SAME—PRELIMINARY INJUNCTION.**—Where a preliminary injunction in a patent case is violated the respondents will not be required to pay the patentee the amount of his royalty where they were acting in an official capacity, deriving no personal benefit from the infringement, especially if there be any reason to believe they acted in good faith. *Phillips v. Detroit*, 92.
5. **PRACTICE—ESTOPPEL.**
6. See **TAXATION**, 1—**COURTS**, 1.
7. See **CONSTRUCTION OF FEDERAL LAWS**, 2, 8.
8. See **CONSTRUCTION OF STATE LAWS**, 10.

INSOLVENT AND INSOLVENT DEBTOR.

1. See **FRAUD**, 1.
2. See **MORTGAGEE**, 8.

INSURANCE AND POLICY OF INSURANCE.

1. Statements in an application for insurance or answers to questions

INSURANCE AND POLICY OF INSURANCE—*Continued.*

are either warranties or representations. If warranties, then materiality, or want of materiality as to the risk has nothing to do with the contract. The only question is were they untrue, and, if so, the policy is void. But if representations, then to avoid the policy they must be substantially and materially untrue, or made for the purpose of fraud.

2. The true rule as to what amounts to a warranty, or what amounts to a representation, is: Whenever the answers are responsive to direct questions asked by the insurance company, they are to be regarded as warranties, and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations. *Buell v. Conn. M. L. I. Co.*, 9.
3. Insurance was in the name of P., describing the property as "his." Policy provided that "if the interest or property insured be leasehold, or that of mortgage, or any other interest not absolute," it must be made known and expressed in the policy. The property was purchased under a mechanic's lien sale by V., who placed it in the name of P. and procured the insurance as the agent of P. V. subsequently procured another title through a sheriff's deed under an execution sale. The mechanic's lien proceedings were void through want of jurisdiction. The court decided that P. had neither a legal nor equitable ownership to the extent represented in the policy and could not recover. *Porter v. Aetna Ins. Co.*, 100.
4. **CONTRACTS OF INSURANCE—CONSTRUCTION.**—Contracts of insurance are to be construed as other contracts. The rule is that all parts of the contract are to be taken together; they shall be liberally construed, and such meaning be given to them as will carry out and effectuate to the fullest extent the intention of the parties, and no portion of the contract will receive such a construction as will tend to defeat the obvious general purpose of the parties entering into it.
5. **INCREASE OF RISK.**—Where there is a provision against increase of risk—it does not mean any use of the property by defendant by which liability to fire may be increased to any extent—but it means an essential increase of risk.
6. **ALTERATIONS AND REPAIRS.**—A permission in the policy to the assured to make alterations and repairs incidental to the business, does not mean all alterations which the parties might desire to make connected with the carrying on of business, but only such as would not essentially and materially increase the liability of the property to be destroyed by fire.
7. **AGENT'S RELATIONS TO THE COMPANY AFTER DELIVERY OF THE POLICY.**—After the policy is delivered by the agent effecting the insurance to the company, his relations to it are changed, and it would not be bound by any knowledge by him afterwards acquired

INSURANCE AND POLICIES OF INSURANCE—Continued.

in relation to alterations or repairs. *Oran, B. & Breed v. City Ins. Co.*, 577.

8. **CONDITION IN POLICY OF INSURANCE AS TO EXPLOSION.**—A policy of insurance against loss by fire had a provision to the effect that the company was not to be liable for loss or damage caused by explosion of any kind unless followed by a fire, and only then to the extent caused by the fire. A fire broke out in the property insured against; this produced an explosion, the result of which caused the property to be destroyed: *Held*, that the policy covered the loss by fire.
9. **EXCEPTIONS AS TO ANY EXPLOSIVE SUBSTANCE BEING KEPT IN THE PREMISES.**—The company inserted an exception in the policy to the effect that it would not be liable for loss or damage occasioned by any explosive substance except only for such fire as would result therefrom, nor would it be liable for that unless the privilege be given in the policy to keep such articles. There was in the premises an explosive material known as flour dust, which exploded on being reached by an outside fire, destroying and consuming the premises: *Held*, that there was nothing in the terms of the policy which withdrew protection against fire, although that fire should involve an explosion. The intention and meaning of the parties constitute the contract, and the policy, like all other instruments in writing, must be construed in the light of surrounding circumstances. The company took the money of the assured, when it knew or ought to have known that the property had connected with it more or less of this explosive substance, and it could not have intended to do this if, according to the terms of the policy, it was known to possess no validity whatever. Hence this particular "explosive substance" must be construed as not within the terms or meaning of the particular language of the policy upon that subject. *Washburn v. Miami Valley Ins. Co.*, 664.

JUDGMENT.—See EVIDENCE, 6—ESTOPPEL, 8.

JURISDICTION.—See ADMIRALTY, 7.

1. The Circuit Court of the United States has jurisdiction of a suit in equity, to restrain the infringement of a trade mark registered under the act of Congress, of July 8, 1870, (16 Stat. at Large, chap. 230,) irrespective of the residence of the parties to the suit.
2. The fact that both complainant and respondent are citizens of the same State, does not deprive this court of jurisdiction.
3. The act of July 8, 1870, (16 U. S. Stat. at Large, chap. 230,) and of March 3, 1875, (18 Stat. at Large, part 3, chap. 17, sec. 1,) construed with reference to said jurisdiction. *Duwell v. Bohmer*, 168.
4. See PLEADING, 1.
5. See REMOVAL, 12—STATE COURT, 1.
6. See ADMIRALTY, 22—ESTOPPEL, 9.
7. See REMOVAL, 9.

JURISDICTION—Continued.

8. **JURISDICTION IN FEDERAL COURT CO-EXTENSIVE WITH THAT IN STATE COURT, WHEN.**—By virtue of sec. 25, act of March 3, 1875, original jurisdiction is conferred on the Circuit Court concurrent with the courts of the several States of all suits of a civil nature at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and which arise under the Constitution or laws of the United States.
9. **NECESSARY AVERMENTS.**—Parties suing in this court must, however, allege by proper and apt averments enough to maintain the Federal jurisdiction according to this rule. *Eaton v. Calhoun* 598.
10. **JURISDICTION—BILL TO IMPEACH FOR FRAUD—AVERMENTS NECESSARY.**—In a proper case a decree may be impeached collaterally in another court; but where a bill is brought to set aside and declare void a decree rendered in this court, whether on the ground of fraud or otherwise, this court being the one in which the decree was rendered, is the only tribunal which can properly take cognizance of such a bill.
11. **PARTY HAVING AN INTEREST MAY INTERVENE, WHEN.**—It has been frequently ruled in the Courts of the United States that a person, having an interest though not a party to the suit, may intervene to assert his rights without reference to the citizenship of the parties.
12. **BUT IF THE DECREE ASSAILED HAS BEEN EXECUTED?**—Where a court has jurisdiction of a suit brought to impeach a former decree for fraud, if the decree has been carried into execution, the party complaining of the former decree may be put into the situation in which he would have been if the decree had not been executed. —*Osborn v. Mich. Air Line R. R. Co.*, 508

13. See CORPORATION, 3, 5, 6, 7 and 8.

JURY AND JURORS.—See CONTEMPT, 2

LIBEL.—See EVIDENCE, 1

LIEN.

1. See MORTGAGE, 1.

2. See SALVAGE, 1.

3. See ADMIRALTY, 10, 28-36.

4. **BONDS LOANED BY STATE—LIEN.**—Where a State issues bonds, transferable by delivery, and loans the same to a railroad company, without indorsement or guarantee, to be sold for money to aid or accommodate the company, which bonds are accepted upon the understanding and agreement: First, that the State is invested with a lien upon the company's railroad and property to secure "the payment by said company of said bonds with the interest thereon as the same becomes due;" second, that the interest shall be paid by the company to the financial agent of the State at least fifteen days before it shall become due, or satisfactory evidence be produced that it has been paid or provided for; and, third, that the principal

LIEN—*Continued.*

of the bonds shall be paid by the company by means of a sinking fund in the State treasury, created by the purchase and deposit therein of Tennessee interest-bearing bonds—the relation of the State to the bondholder is not changed, by any of these stipulations, from that of a principal debtor to a surety.

5. **SAME—SAME.**—Nor does the company become debtor to the bondholder in any degree whatever. There is no express promise on its part to the bondholder, nor is any contract relation implied between him and the company.

6. **SAME—SAME—SECTION 3 OF THE TENNESSEE INTERNAL IMPROVEMENT ACT OF FEBRUARY 11, 1852, CONSTRUED.**—The 3d section of the act, under which the aid is given and lien declared, contains no language importing such promise to the bondholder. It declares merely that the State shall be invested with a lien for the payment of the bonds of the company. This lien the State imposes if its aid is accepted, and as a condition of the grant. The language may imply a promise by the company, accepting the aid, to pay the State; but there is no obligation of the company to pay the bondholder, resulting either from the positive law or from contract, express or implied. *Stevens v. L. & N. R. R.* 716

7. See **ADMIRALTY**, 89.

LIMITATION.—See **ADMIRALTY**, 26.**MANDAMUS.**

1. Where writs of mandamus are resorted to for the purpose of compelling a municipal corporation to levy a tax, this court will conform as much as possible to the State practice in similar cases.

Unless special circumstances should require it, a peremptory writ will not be issued, commanding a levy of taxes to pay a judgment against a municipal corporation at a time different from the next general levy. *Wisdom v. Memphis*, 285.

2. **POWER OF THE FEDERAL COURT—LOCAL LAW—MANDAMUS.**—This court has power to so control its process as not to violate the local law, and to prevent injustice to the tax-payer.
3. **STATE COURT—SAME.**—The State court can make no order or decree which shall interfere directly or indirectly with a *mandamus* issued from this court. This court not only has the power to pass upon all questions connected incidentally with the collection of the tax (in question), but it is its duty to exercise that power in such a way as that no property justly subject to its burden shall escape liability, and that those who have honestly paid their obligations shall, as far as possible, be protected.
4. **CONSTRUCTION OF THE WORDS "MAY" AND "SHALL."**—The word "may" is not to be construed in all cases as "shall." The ordinary meaning of the language used in legislative acts must be pre-

MANDAMUS—Continued.

- sumed to be intended, unless it would manifestly defeat the object of the provisions.
- 5. **LAWS IMPOSING TAXES TO BE UNIFORM.**—While laws imposing taxes are required to be uniform, it is no objection to a tax that there is a want of uniformity in its application.
- 6. **SET-OFF—TAXES.**—The general law is well settled that no set-off is admissible against demands for taxes, as they are not in the nature of contracts between party and party, but are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required. The fact that persons complaining were not parties to a suit out of which orders grew upon them to pay taxes, affords no ground to set such orders aside as to them.
- 7. **MANDAMUS—ITS NATURE.**—It would seem that where the judgment on which a *mandamus* is founded has been reversed, the *mandamus* would fall also. *Apperson v. City of Memphis*, 363.

MARRIAGE SETTLEMENT.—See **FEME COVERT**, 3.

MORTGAGE.

- 1. A mortgage lien upon a vessel has no priority over maritime claims of any class for which either the State or maritime law gives a lien, but is postponed to those liens. *Tug Alice Getty*, 18.
- 2. See **ADMIRALTY**, 35.
- 3. **RAILROADS—ACCRETIONS—MORTGAGES—WHAT ARE INCLUDED.**—Where a railroad company makes a general mortgage of the railroad this does not pass after-acquired lands, unless they are used in connection with the actual operations of the road as a part thereof.
- 4. The doctrine of accretions does not extend to such lands
- 5. **THE RULE AS TO AFTER-ACQUIRED LANDS.**—If the intention is to include in the mortgage lands which the company expect to acquire, they should be described with reasonable certainty. They would not pass under a mortgage, where the property is described as "the railroad then constructed and to be constructed, etc., and all other corporate property, real and personal of said railroad company, belonging or appertaining to the said railroad, whether then owned or thereafter to be acquired." *Calhoun v. M. & P. R. R.*, 442.
- 6. **FORECLOSURE OF MORTGAGE—NOTICE—QUIT-CLAIM DEED—RELEASE OF MORTGAGEOR'S INTEREST.**—The mere fact that one takes a quit-claim deed does not establish the fact that he is not a *bona fide* purchaser, and consequently such mode of conveyance, like that by warranty, carries the title which the grantor can lawfully convey.
- 7. **SAME—SAME—PUBLIC RECORDS.**—The grantee may rely upon the public records when he has no notice of an infirmity in his grantor's title and pays a valuable consideration.

MORTGAGE—Continued.

One who merely takes a release of the interest of the mortgageor, whose unrecorded mortgage is outstanding, obtains only the equity of redemption subject to such mortgage.

8. **SAME—SAME—BONA FIDE PURCHASER.**—In order to constitute the purchaser under the quit-claim deed, in such a case, a *bona fide* purchaser, he must have paid the purchase money before the discovery of the plaintiff's unrecorded deed.
9. Where a mortgage is produced, showing that it covers certain lands, unrecorded at the time of the purchase of such lands by quit-claim, the burden of proof is on the purchaser of the land to show that he had neither actual nor constructive notice of any such incumbrance. *White v. McGarry*, 572.
10. **FORECLOSURE—REDEEMING AN OUTSTANDING MORTGAGE BEFORE PROCEEDINGS END IN COMPLETE FORECLOSURE.**—Where a mortgage redeems the land after a sale under foreclosure proceedings, advertised, as provided by law, he becomes assignee of the mortgage, and is entitled to enforce it as such, and to have the same rate of interest as the mortgage bore.
11. **EFFECT OF REDEMPTION IN SUCH CASE.**—The effect of the redemption in such case is to cancel the sale and, as the complainant in foreclosure proceedings is under no obligation to pay off the mortgage, the payment will not be treated in equity as operating to discharge the same. *Dodge v. Fuller et al.*, 603.

MORTGAGEOR AND MORTGAGEE.

1. **MORTGAGEE—ACCOUNTABILITY FOR RENTS.**—A mortgagee in possession of the undivided one-half of property is not accountable for rents if unable to lease it or there has been a failure, after judicious leasing, to collect rent.
2. **SAME—COURT OF EQUITY—USE.**—But where a partnership has been entered into to use the property with another and the venture turns out disastrous, a court of equity will not inquire under such circumstances whether there was profit or loss, but a fair rental value will be charged over repairs, insurance, etc., and taxes paid. *Engleman Trans. Co. v. Longwell*, 601.
8. If the mortgageor is insolvent, the mortgagee may, where there is an unauthorized injury to the mortgage security, maintain an action *Morgan v. Gilbert*, 645.

MOTION.—See ADMIRALTY, 1.**MUNICIPAL BONDS.**

1. **MUNICIPAL BONDS—RAILROAD SUBSCRIPTION.**—Where a town is authorized by statute to subscribe to the capital stock of a railroad company and is required to pay the subscription in "not exceeding" six annual installments, and is further authorized to anticipate the collection of taxes by issuing "short bonds" bearing six per cent. interest: *Held*, that the proper construction of the act requires the

MUNICIPAL BONDS—Continued.

bonds to mature at a date not longer than the assessments of taxes are due and payable; and that bonds payable in ten years and bearing seven per cent. interest are unauthorized by the act. These requirements are not directory only, but imperative, and must be complied with by the town. Where the bonds on their face show non-compliance with the statute, there can be no *bona fide* holder for value of such bonds.

2. **SAME—ARTICLE 2, SECTION 29, CONSTITUTION OF TENNESSEE.**—Neither article 2, section 29 of the Constitution of Tennessee of 1870, nor the act of January 28, 1871, chapter 50, code 491a passed to enforce it, confers any power upon municipal corporations to issue bonds in payment of a stock subscription to railroads. The only effect of that act is to require a three-fourths vote of the citizens of the town as a pre-requisite, and to designate the County Court or the board of mayor and aldermen as the agents to execute whatever powers exist in the particular case. The powers must be found elsewhere in the statutes. Nor does the first clause of the second sub-section of the act confer any power to issue bonds under the second clause of the sub-section relating to stock subscriptions, even if the first clause can be held to authorize in itself bonds to be issued when "credit is given or loaned" in aid of a railroad. Giving or lending credit, and subscribing stock, are essentially different.
3. **SAME—ACT OF 1842, CHAPTER 117, CODE 1142 ET SEQ.**—This act, as modified by the Constitution and subsequent legislation, is the general law under which all corporations must act in subscribing stock to railroads. It confers no express power to issue bonds in payment of the subscriptions, and unless such power is conferred by some other enactment no corporation can issue bonds in payment of a subscription to capital stock, but must pursue the requirements of this act. There is no statute conferring any express power on the town of Dyersburg to pay its subscription to the Paducah & Memphis Railroad Company's capital stock in ten years' bonds, bearing seven per cent. interest, and none can be implied from the authority conferred upon it by this act and its amendments.
4. **SAME—IMPLIED POWER TO ISSUE BONDS.**—There is no implied power in a municipal corporation to issue negotiable bonds in payment of a debt, which it is authorized to contract. No decision of the Supreme Court of the United States or of the Supreme Court of Tennessee has so adjudicated; and, in the absence of any controlling decision to that effect, this court holds that the power must be expressly conferred, or necessarily implied, from some power given other than the bare authority to contract a debt for a particular purpose, whether it be a corporation purpose or not. Public safety requires that the implications in favor of such power shall not be

MUNICIPAL BONDS—Continued.

extended beyond the point to which they have already gone. *Bona fide* holders will be protected against the irregular exercise of granted authority, but the authority itself should not be created by judicial decree upon unnecessary implication.

5. **SAME—CONDITIONS PRECEDENT.**—Where a bond upon its face promises to pay a sum of money to a railroad company "upon the express condition, however, that said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court house in said town," it is a condition precedent to the payment of the money, and not a mere covenant of the railroad company to so construct the road, for the breach of which compensation in damages is the remedy. No holder of the coupons can recover on them without showing either the performance or a readiness to perform the condition. The bond itself charges the purchaser with notice of the condition, and it is he that trusts the railroad company, and not the town.
6. **SAME—RULES OF CONSTRUCTION.**—It is a universal rule of construction of such instruments that the actual intention of the parties will prevail over that reached by any technical rules prescribed for ascertaining the intention. And, therefore, neither the rule that, if part of the money be payable before the covenant on the other side is to be performed; nor the other rule that, if the promisor has received part of the consideration the covenants shall be held to be independent of each other, will override the intention manifested by the contract that the railroad should be built before the money can be demanded. These rules have always yielded to a clear manifestation of a different intention. The rule as to payment by installment does not apply to installments of interest, but only where the principal is so payable. The rule as to part performance does not apply where the part unperformed is the essential consideration.
7. **SAME—REASONABLE TIME.**—If no time be specified for the performance of the condition to construct the road, the law implies a reasonable time. And, when the amendment to the charter of the company of January 27, 1870, chapter 49, section 5, required the road to be completed within seven years from that date, this will be taken as the time within which the condition should be performed; the bonds being dated on the 10th of May, 1873, and subsequent to the amendment. *Green v. Dyersburg*, 477

NEGLIGENCE.

1. See **ADMIRALTY**, 10, 12, 15, 18, 19, 20, 25.
2. See **ADMIRALTY**, 24.

NEW TRIAL.

1. See **EVIDENCE**, 1.
2. **RULE AS TO NEW TRIAL—FAILURE TO INSTRUCT.**—The court may comment on the facts in charging a jury when done to aid it in

NEW TRIAL—Continued.

reaching a just conclusion, but ought not to assume to decide the matter of fact itself. Where, therefore, an instruction is asked looking to an explanation of the meaning of certain words or phrases, which call the attention of the jury alone to such testimony as was the strongest in favor of the party asking it without noticing in any way the proof offered by the other side, such instruction may be properly refused.

8. **SWORN STATEMENT—WHEN AN ESTOPPEL.—SWORN ADMISSION.**—The distinguishing feature of an estoppel is that under no circumstances can it be averred against; it is not susceptible of explanation and often speaks against the truth. A sworn admission may become an estoppel; as it may, whether sworn to or not, if parties act on it, or would be prejudiced by it; and perhaps, in some cases where no explanation can be given, and the party is caught in deliberately attempting to cross himself by swearing two contrary ways about the same fact, it may, in one sense, be called an estoppel to hold him to his first oath and not permit him to gainsay it.
4. **SAME—SAME.**—But if made inconsiderately or by mistake, the party ought certainly to be relieved from the consequences of his error. It would make a most odious estoppel to forever hold a party to a falsehood, whether any one has been injured by it or not.
5. **SAME.**—A party is bound by his oath, unless he can satisfactorily show that he did not in the first instance willfully make a false oath. *Seemle*, that a man is never bound by a false oath so that he cannot show the truth as between himself and others who are strangers, and have been neither injured nor prejudiced by the original falsehood.
6. **WHEN OATH IS ACTED UPON.**—The rule is that where an adverse party has acted upon or been prejudiced by an oath, though innocently made, the deponent cannot afterwards contradict it. He is estopped. But he is not precluded from contradicting it, unless other parties have acted upon it or he has taken the oath without mistake or inadvertence on his part. And in Tennessee, if he willfully swear falsely he is estopped under all circumstances. If he has so sworn he cannot contradict it or offer proof of others to contradict it. *Behr v. Conn. M. L. I. Co.*, 692.
7. **SUIT FOR THE INFRINGEMENT OF A PATENT.**—On motion for a new trial defendants offered affidavits of jurors to show the method of calculation adopted by the jury with items of debit and credit as allowed in determining the verdict, to demonstrate that such verdict was contrary to the law as charged by the court, and unsupported by the evidence.
8. Such affidavits are not admissible to show the mode of computation adopted by the jury to be contrary to the law and the evidence. *R. Chem. W. v. Finnie*, 459.
9. Verdict rendered in favor of plaintiff, but judgment delayed because

NEW TRIAL—*Continued.*

of motion for new trial: *Held*, that on overruling the motion the plaintiff is entitled to judgment for the amount of the verdict and interest from the day it was rendered. And the rule applies as well to actions of *torts* as to those founded upon contracts. *Gibson v. Cin. Enquirer*, 88.

NOTES.—See CONSTITUTIONAL LAW, 1.

NOTICE.—See MORTGAGE, 6.

OBLIGATIONS.—See CONTRACT, 1.

PATENTS AND INFRINGEMENTS.

1. See JURISDICTION, 1.

2. The court may, on the hearing of a cause in chancery brought to enjoin the infringement of a patent, inspect such patented article, and determine from this, without other evidence, whether it is or is not the subject of a patent. *Everett v. Thatcher*, 234.

8. See PLEADING, 5.

PARTIES.

1. See REMOVAL, 9.

2. See BONDS, 6.

PARTNERS AND PARTNERSHIP.

1. See FRAUD, 1.

2. Beyond dispute, a participation in the profits of a business is *prima facie* strong evidence of a partnership in it, but a loan to a person engaged in trade on condition that the lender shall receive a rate of interest in proportion to profits, or a share of the profits, does not of itself constitute the lender a partner, nor does a contract to remunerate a servant or agent of a person engaged in trade by a share of the profits, of itself, render such servant or agent liable as a partner. *In re Ward*, 462.

PENSIONS.—See CRIMINAL LAW, 1.

PLEADING.

1. JURISDICTION—CONSTRUCTION OF ACT OF 1875, AND 11TH SECTION OF JUDICIARY ACT—CITIZENSHIP.—The mere fact that the subject matter of a suit has been transferred for the purpose of giving jurisdiction to this court, will not defeat jurisdiction, provided there has been a *bona fide* sale and transfer by which the transferee becomes the real owner and thereby the party to the suit.

2. GENERAL RULE.—It is a general rule that suit may be maintained in the name of a person who is the holder of a negotiable promissory note, though he has no interest therein, provided it is brought for the benefit and by direction of the real owner.

3. EXCEPTION TO SUCH RULE.—But such rule cannot be applied when the question of jurisdiction is to be determined under the act of Congress in question. *Hawley v. Kepp*, 177.

4. FOREIGN CORPORATION—A CITIZEN OF ONE STATE SUED AS DEFENDANT WHO CLAIMS TO BE A CITIZEN OF ANOTHER—SERVICE—JURIS-

PLEADING—Continued.

DICTION.—Where a foreign citizen (corporation) sued a person in the Circuit Court of the United States, and had service upon him as a citizen of Michigan, when, in fact, it turned out that he was at the time of such service a citizen of Illinois: *Held*, that the service was good, and a demurrer to a plea setting up such defense was sustained. *Com. B'k of Commerce v. Green*, 181.

5. Case is not revived unless there is an order to that effect. Action survives against administrator where there has been an infringement, the latter being held as a trustee for the owner. *Atterbury v. Gill*, 239.
6. See JURISDICTION, 9.
7. See JURISDICTION, 10, 11, 12.
8. See PRACTICE, 22.
9. See CORPORATION, 8.
10. See INDICTMENT, 2.

POWER.

1. **POWER OF REVOCATION.**—If a husband, not contemplating bankruptcy, but wholly free from debt, convey lands to his wife, to her separate use free from his control, the deeds reserving to the husband a power of revocation in whole or in part and a power of appointment by deed or will to any uses or persons he may designate, and he become bankrupt three years afterwards—such settlement will be upheld against the assignee in bankruptcy.
2. If it be omitted to insert a power of revocation in a voluntary settlement, this will be regarded in a court of equity as a suspicious circumstance.
3. A court of equity will protect a wife in a settlement made by a husband, when free from debt and not thereto induced by fraudulent motives, if it confers any benefit on her. And notwithstanding the deed may not contain every provision that a chancellor might direct to be inserted in a settlement ordered by himself, and, moreover, has in it reservations which impair the full benefit of the provision in favor of the wife, it will be sustained if any substantial benefit is conferred on her so long as she is in the actual enjoyment of the same.
4. **SUCH POWERS AS DO NOT PASS UNDER THE BANKRUPT ACT TO THE ASSIGNEE.**—Under sections 5044 and 5046 powers of revocation and appointment, to be exercised by the bankrupt, do not pass to the assignee. Only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights, passes. *Jones v. Clifton*, 191.
5. See MUNICIPAL CORPORATION, 4.
6. See MANDAMUS, 2, 8—MUNICIPAL BONDS, 4

PRACTICE.

1. See ADMIRALTY
2. See MOTION.

PRACTICE—*Continued.*

3. A party interested in the *res* in controversy, not made a party in the bill, may on his motion, or petition, be made a party by amendment of the bill. *Scott et al. v. M., C. & L. M. R. R.*, 15.
 4. Section 914 R. S., which adopts the practice, pleadings, forms and modes of procedure of the State courts, applies only to such as are established by the statutes of the several States, and not to modes of procedure established by judicial construction of common law remedies.
 5. The Federal courts are not bound by the decision of the Supreme Court of a State, which decides that mandamus is the only proper remedy upon municipal bonds.
 6. *Quære*, whether this section extends to the practice prescribed by rules of the State courts of general application. *Sandford v. Portsmouth*, 105.
 7. See INJUNCTION, 1.
 8. See NEW TRIAL, 1.
 9. See ADMIRALTY, 4.
 10. See ATTACHMENT, 1.
 11. See PLEADING, 4, 5.
 12. While the pleadings, practice and forms in the Circuit and District Courts should conform as near as may be to the practice in the State courts, yet a commissioner of the United States may, as an officer under the State law, take the verification of all necessary papers in order to procure the arrest of the defendant. *Fulton v. Gilmore*, 260.
 13. See ADMIRALTY, 22.
 14. A party, who is unable to give security for costs, may, notwithstanding, prosecute his suit if he make an oath that owing to his poverty he is unable to give security, and a respectable attorney shall certify that he has examined the grounds on which it is proposed to bring suit, and is of opinion that it possesses merit, and that the plaintiff is entitled to a recovery. *Bradford v. Bradford, Adm'r*, 230.
 15. See MANDAMUS, 1.
 16. JUDGMENT BY DEFAULT—WHEN SET ASIDE.—Judgment by default will not be set aside, unless the defendant can show that he was guilty of no negligence in suffering the judgment, and has a meritorious defense.
- THE RULE AS TO A STAY OF PROCEEDINGS WHERE JUDGMENT HAS BEEN RENDERED IN ANOTHER STATE AND SUIT BROUGHT HERE UPON IT.—If the plaintiff can get no execution on his judgment in the other State, by reason of a supersedeas, the court may well be asked here to stay proceedings, unless it appears to have been a useless appeal or writ of error, in which case the stay may be refused. The rule in England and here is the same, which is not to stay proceedings where a suit is brought upon a judgment, un-

PRACTICE—*Continued.*

less that judgment has been appealed from and a supersedeas has been procured.

The practice in England and America as to stay of executions and suits on judgments, fully discussed. *Dawson v. Daniel*, 301.

17. RES ADJUDICATA—PRACTICE—MOTION.—An application was made for a *rend. ex.*, which was resisted by affidavits, in which it was attempted to be shown that there was an abandonment of a levy. This was not a trial on the merits, and does not prevent the institution of other proceedings by bill. *Steers v. Daniel*, (note,) 810.

18. See REMOVAL, 8.

19. See RECEIVER, 1.

20. See BONDS, 5, 6, 7.

21. See CRIM. LAW, 3.

22. The plaintiffs dismissed their suit voluntarily after the defendant had filed a plea of set-off, which is permitted under the statute in Tennessee: *Held*, that the defendant may proceed on such plea as plaintiff, and that the cause will, in such event, be tried as if in the first instance he had sued on his counter claim. *Meyer, Weiss & Co. v. Gatens*, 559.

23. See CORPORATIONS, 6.

24. See RECOGNIZANCE, 1, 2.

25. See RAILROADS, 4.

26. DISCREDITING ONE'S OWN WITNESS.—Where one reads the depositions of a witness on the trial of a cause, he vouches for the credibility of the one testifying. He is not absolutely concluded, as courts recognize the possibility of surprises in such matters. He may show, if he can, by other witnesses that the facts are not as deposed to; but he will not be permitted to impeach the reputation for truth or credibility of his own witness.

27. SAME.—Nor will the court permit such party by argument, based on the assumption that such witness is interested against him and dishonest, to destroy the effect which the law requires the court to give the evidence as against the party offering it, when voluntarily adduced by such party. If believed at the time to be false, the deposition should have been withheld. *Tarsney v. Turner*, 735.

RAILROADS.

1. RAILROADS AND EXPRESS COMPANIES.—Railroads are *quasi* public institutions. They are authorized to facilitate and not to control or force from legitimate and natural channels, or hinder or obstruct, the business of the country.
2. DUTY TO CARRY FOR EXPRESS COMPANY.—The duties and office of railroads and express companies are widely different and wholly distinct. The first was created to furnish motive power and to receive and carry such freight as is appropriate to such a mode of transportation. But it was never contemplated that they should

RAILROADS—Continued.

carry money or such valuable articles as required special care and attention during their transportation. Much of the service rendered by express companies and appropriate to their functions, is not by law imposed on railroads. They were not created to do an express business, are not suited to such service, and possess no legal capacity to engage in it; nor can they legally refuse to carry for complainant and extend to its messengers and agents all facilities hitherto furnished.

3. **COMMON CARRIERS.**—As common carriers railroads are as much bound to carry for another common carrier as they are to carry for other persons, and the carriage of such goods is in the strict line of railroad duty.
4. **ESTOPPEL.**—Where defendant for a long time acquiesced in complainant's right to have its freight so carried by it, as an express carrier, it is estopped from exerting its authority to exclude it now; (not admitting its right to do so, however, in any event.) *Dinmore v. L. & L. Ry Co., etc.*, 672.

RECEIVER.

1. **PROPERTY IN HANDS OF RECEIVER—SUITS AGAINST—INJURED PARTY—HIS REMEDY.**—A receiver represents the court. There can be no interference with money or property in his possession without the permission of the court appointing him. Being an officer of the court, he is entitled to its protection. He can do nothing except as he is authorized by the court, and when in possession of money or property under the orders of the court, it is a contempt of court to disturb his possession. But an injured party is not without remedy. He may apply to the court having custody of the property or fund for appropriate relief; and upon such application he will be permitted to go before a master or sue in a court of law.
2. **WHEN THE CONSTITUTIONAL RIGHT OF A TRIAL BY JURY MAY BE CLAIMED.**—The constitutional guaranty securing trial by jury does not extend to chancery courts. It embraces "suits at law" only. Courts of chancery are, and always have been, invested with the prerogative of deciding facts as well as law in cases pending before them.
3. **WRONGS COMPLAINED OF—TORTS.**—Where the wrong complained of is a tort, an action at law would be the proper remedy if there is any one capable of being sued. But a receiver is not personally liable for a tort committed by a railroad operated under his direction as receiver. And the court, whose officer he is, cannot be sued without its consent.
4. **PETITIONER SEEKING RELIEF IN THIS COURT FOR A TORT COMMITTED BY A RAILROAD, OPERATED BY A RECEIVER—JURY REFUSED.**—Petitioner in a case of tort, committed by receiver's road is compelled to seek redress here or forego all relief. He will be required,

RECEIVER—*(Continued.)*

on coming here, to pursue his remedy according to the practice prevailing in this court. The court may in its discretion call in a jury, or invoke the assistance of a master, or take such other steps for a judicial ascertainment of facts as it may regard most appropriate in the particular case. But all this rests in the judicial discretion of the court. When this court acquires jurisdiction by reason of foreclosure proceedings, it can fully administer all needed remedies. Where, therefore, petitioner, as administrator, asked for a jury to assess damages for the killing of his wife by a railroad so operated, the same was refused properly, because not deemed necessary by the court. *Kennedy v. I., C. & L. R. R. Co.*, 706.

RECOGNIZANCE.

1. **DEFENSE TO SCI. FA. — RECOGNIZANCE—SUFFICIENCY OF BOND.**—Defendant gave a recognizance to appear and answer a charge for passing counterfeit money, which was forfeited: *Held*, that he could not afterwards assert by way of defense to *sci. fa.* upon such recognizance the fact of the indictment being defective. The law in Tennessee is that where a bond or recognizance would have been good at common law it will be deemed in any proceeding, where the question may be raised, a sufficient statutory bond.
2. **WHERE CLERK TAKES BOND ON DAY THAT COURT SITS—PRESUMPTION.**—Bail bond was executed before the clerk, who wrote at the proper place, "signed, sealed and acknowledged and approved by" himself. There was nothing in the record to show that the defendant was brought before the clerk for examination and bail as a magistrate. It did appear, however, that the court was in session that day: *Held*, that the presumption was that the bond was taken by the clerk under the direction of the court, and that while courts have an inherent power to take recognizances, clerks can do so by virtue of statute only. *U. S. v. Evans*, 605.

REDEMPTION.—See **MORTGAGE**, 11.

REMOVAL.

1. The act of March 3, 1875, does not entirely repeal section 639 of the United States Revised Statutes, which relate to the removal of causes from the State to the Federal courts. Third subdivision of section 639, which relates to suits between citizens of the States in which they are brought and citizens of other States, is not inconsistent with the provisions of the act of March 3, 1875.
2. Taking the act of March 3, 1875, and provisions of third subdivision of section 639 together, the result is: First, that no citizen of a State in which a suit is commenced can remove it, except by filing a petition either before or at the term at which it might first be tried.
3. That if there be a suit between a citizen of the State in which it is brought and a citizen of another State, the latter may remove it by petition if filed at any time before trial or final hearing, on mak-

REMOVAL—*Continued.*

ing an affidavit of prejudice or local influence—such as will prevent a fair trial from being had.

4. The law does not favor the repeal of statutes by implication. The two must be such as that they cannot be reconciled. *Cooke v. Ford and Arnold*, 22.
5. The act of filing in a State court a petition for the removal of a case to the Circuit Court of the United States is no waiver of a fraud in procuring service of process.

Accordingly where property was fraudulently decoyed within the jurisdiction of a State court and seized upon a writ of replevin, and the defendant at once removed the case to a Federal court, and moved to set aside the service of the writ: *Held*, the motion did not come too late. *Moynahan v. Wilson*, 130.

6. Where there are several defendants, to entitle a non-resident to remove a cause to the Circuit Court, there must be a controversy wholly between him and the plaintiff, so as in effect a final decree would settle the whole case. *Tyler v. Hagerty*, 257.
7. Parties seeking to remove causes to the United States courts must comply strictly with the provisions and conditions presented by the statute, and any material omission will be fatal to such removal.

The petition for removal must be filed at the term at which the case can be first tried and before trial thereof, and not after such term. *Wilcox & Gibbs v. Follett*, 263.

8. REMOVAL—PRO CONFESSO NO BAR.—A *pro confesso*, taken by complainant at return term, does not operate to prevent the removal of a cause, under the act of 1875, into the Federal Court.
9. INDISPENSABLE PARTY—TRUSTEE NOT SUCH.—The jurisdiction of the court cannot be defeated because the plaintiff cannot obtain full relief by the suit brought as to all parties against whom relief may be needed, but only when it cannot be had against a non-resident defendant without the presence of some resident defendant, whose presence is indispensable.
10. REMOVAL OF CAUSES—CASE IN JUDGMENT.—Where a citizen of Tennessee filed a bill in equity against an insurance company, chartered by Missouri, to cancel certain policies of insurance, loan and interest notes, for an account of premiums and dividends, and to enjoin a sale of his land under a deed of trust given to secure the loans, and the trustee was a citizen of the same State with the complainant: *Held*, that the cause was removable as a controversy wholly between citizens of different States, and that the trustee was not an indispensable party. *Chester v. Wellford*, 847.
11. REMOVAL OF CAUSES—INDISPENSABLE PARTIES—SEPARABLE CONTROVERSY—ACT MARCH 3, 1875, 18 ST., 470—REV. ST., § 639—CLOUD ON TITLE—TRUST DEED TO SECURE DEBT—PRACTICE AS TO PARTIES.—The Federal Courts have no jurisdiction, by removal

REMOVAL—Continued.

from a State court of a bill, to remove a cloud from the title of the plaintiff, where the trustee in a deed of trust to secure a debt and the creditor secured have been made parties defendant, they being citizens of another State; and the defendant in possession whose title is attacked and who executed the deed of trust, is a citizen of the same State as the plaintiff. There is in that case no such separable controversy between the plaintiff and the non-resident defendants as can be wholly determined between them, whether the jurisdiction by removal be claimed under the act of March 3, 1875, 18 St. 470, or that of 1866, Rev. Stat. § 639.

12. **SAME—EJECTMENT IN A COURT OF EQUITY—BILL TO REMOVE CLOUD—JURISDICTION.**—It is one of the peculiarities of the equitable jurisprudence of Tennessee, that a claimant of land out of possession may file a bill in equity to remove the deeds of an adverse claimant in possession as clouds on his title; but whether a Federal Court of equity could maintain such a bill may be doubtful. The question is not raised in this case. It might result only in a repleader on the law side of the court as an action of ejectment, and not defeat the jurisdiction entirely. *Steinkuhl v. York*, 376.
13. A cause cannot be removed to the Federal Court under the act of 1875 unless the citizenship, required by the act, existed at the time of the commencement of the suit in the State Court. *Rawle v. Phelps*, 471.

SALVAGE.

1. From proceeds of sale of vessel salvage is to be paid in preference to prior claims for seamen's wages.
2. The schooner got aground in the Detroit river, when the parties excepting to commissioner's report got her off, claiming the service as that of salvage, and entitled to rank claims for towage and materials furnished. *The Athenian*, 84.
3. **SALVAGE COMPENSATION.**—Where the District Court allowed one-third of the value of a cargo for salvage services which did not consume more than, or a little more than, half an hour's time of a tug, it was set aside on appeal on the ground of its being exorbitant and excessive; the amount of \$750 being deemed reasonable, and which sum was adjudged to the salvors.
4. **RULE ON HIGH SEAS NOT SAME AS ON RIVERS.**—Salvage compensation in cases arising on the high seas cannot be safely followed in cases arising on the western rivers, as the peril of life is generally much less. *Mattingly v. Bales of Cotton*, 288.
5. **SALVAGE—ALLOWANCE.**—The court will not allow the whole net proceeds in the registry as compensation to the salvor, even when his actual expenditures exceed the amount of the fund, except in cases where the owner abandons the property and neglects to reclaim it by appearance in the suit.

SALVAGE—*Continued.*

6. SAME—SAME—CASE IN JUDGMENT.—Where the proof showed that a sunken vessel, after being raised, was worth \$1,700, but being sold *pendente lite* she brought only \$792; and the libellant actually expended \$568.95, under circumstances which would ordinarily have justified an allowance of one-half the property, the court allowed only one-half the net proceeds in the registry.
7. SAME—LOSS BY DEPRECIATION IN VALUE.—A salvor must bear his share of the loss by depreciation in value. He is *sub modo* a joint owner, and in the absence of an express contract, he cannot recover on any theory of a debt due either by the owner or the property, with a lien to be satisfied, at all hazards, to the full extent of the proceeds in the registry. *The Carl Schurz*, 830.

SET-OFF.—See PRACTICE.

TAXATION.

1. TAXATION OF SHARES OF NATIONAL BANK ENJOINED—BANK A PROPER PARTY, WHEN.—To a bill in equity a bank is a proper party complainant when it is sought to enjoin the collection of a tax upon its shares assessed against its stockholders, if it appears that the bank would be subjected to a multiplicity of suits and its business be interfered with, its stock be depreciated and its credit impaired.
2. GROUNDS OF INJUNCTION IN SUCH CASES.—An injunction may be had to stay the collection of a tax on personal property, if the enforcement of the tax would lead to a multiplicity of suits, or where the law authorizing the tax is invalid.
3. RATE OF TAXATION ON NATIONAL BANK SHARES.—Where different rates of taxation are imposed under the laws of a State or municipal government upon different classes of moneyed capital, it is not lawful to tax the shares of National banks at the highest rate imposed upon any class, regardless of the proportion which that class bears to other classes; nor is it confined to the lowest rate upon any class. And where different rates of taxation are imposed upon different classes of moneyed capital the rate of taxation on National bank shares should not exceed the rate imposed upon shares in State banks.
4. DIFFERENCE OF TAXATION—RATES.—The banking capital of Kentucky paid only fifty cents per share as a tax. One of the State banks was located in Paducah whose capital exceeded that of all the National banks there: *Held*, that an ordinance which imposed a tax of \$1.05 per share nominally on all banks, but, from the payment on which the State banks had been adjudged exempt, was an unlawful discrimination against the National bank, and invalid.
5. FURTHER.—Where other moneyed capital was also taxed \$1.05 but a reduction to the whole amount of the owner's indebtedness was to be made before the assessment, and no such deduction was

TAXATION—Continued.

allowed where the capital consisted of National bank shares, the tax upon such shares was declared invalid.

6. **DOUBLE TAXATION.**—It was further held that as the value of the real estate held by the bank was not deducted, it was subjected to double taxation, and the tax was invalid. *City Nat. Bank of Paducah v. Paducah et al.*, 61.

TAXES.

1. See **MANDAMUS**, 5, 6.
2. See **CONSTRUCTION OF STATE LAWS**, 8, 5, 10.

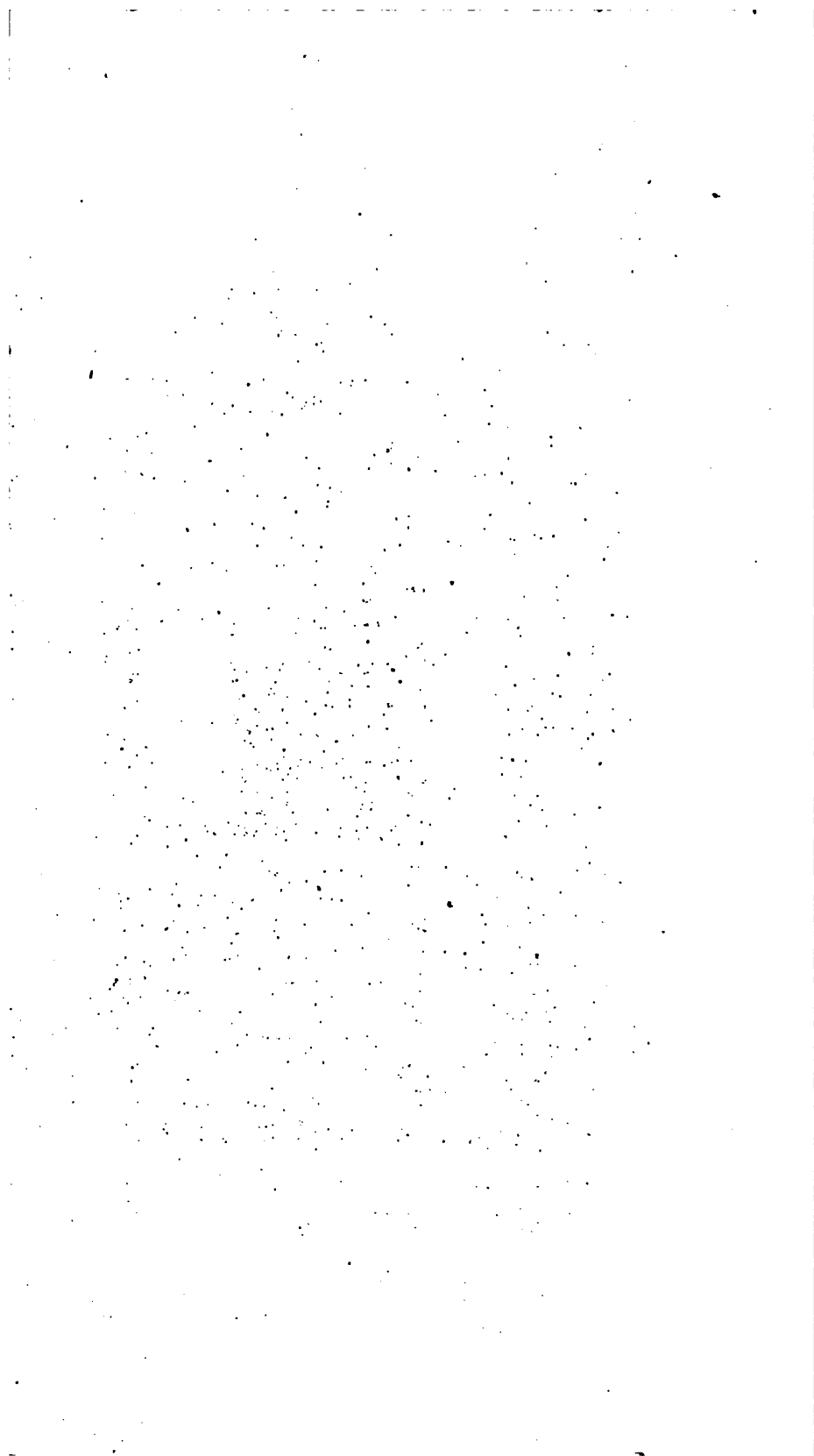
WARRANTY.—See **INSURANCE**, 1.

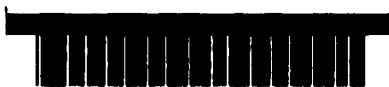
WITNESSES.

1. The travel fees of witnesses attending in court from distances beyond the reach of a subpoena, cannot be taxed against a losing party. The mileage of witnesses attending from out of the district and more than one hundred miles from the place of trial, can be taxed only for one hundred miles. *Mass. L. I. Co. v. Fisher*, (note,) 593.









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